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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM PETER BLATTY,

Petitioner,

vs.

NEW YORK TIMES COMPANY, and DOES 1 through 10, inclusive,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED

1. To what extent does the First Amendment require that guidelines developed in the context of defamation be applied to other tort causes of action?

(a) Does the First Amendment require that all "injurious falsehood" causes of action against a media defendant must satisfy not only the "actual malice" standard but all the elements of defamation actions even if such elements are not part of the causes of action alleged?

(b) Specifically, where a plaintiff alleges that a media defendant knowingly

published false statements with the purpose of interfering with plaintiff's prospective business advantage, does the First Amendment require that the "of and concerning" element of a defamation action be satisfied?

2. Does the First Amendment insulate a media defendant which markets a product by means of a deliberate and knowing false statement not of and concerning a particular person from liability to those harmed by such false statement?

3. May a state court which decides a Federal constitutional issue on the basis of federal precedents nevertheless preclude review by this Court by formalistic invocation of state grounds?

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM PETER BLATTY, PETITIONER

v.

NEW YORK TIMES COMPANY and DOES 1 through 10, inclusive, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

WILLIAM PETER BLATTY petitions for a Writ of Certiorari to review the judgment of the California Supreme Court in this case.

OPINION BELOW

The opinion of the California Supreme Court (App. 62) is reported at 42 Cal.3d 1033, 728 P.2d 1177, 232 Cal.Rptr. 542 (1986).

JURISDICTION

The judgment of the California Supreme Court was entered on December 29, 1986. App. 62, 103, 104. A petition for rehearing was denied on February 26, 1987. App. 110. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). Pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 20.4, this petition is timely filed if filed by May 27, 1987, i.e., ninety days from the date on which the petition for rehearing was denied.

CONSTITUTIONAL PROVISIONS INVOLVED.

The First Amendment to the United

States Constitution provides in pertinent part:

> "Congress shall make no law... abridging the freedom of speech, or of the press..."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

William Peter Blatty, author of The Exorcist, sued the New York Times Company ("the Times") for its failure to include his 1983 novel, Legion, on its weekly Best Seller List alleging, inter alia, intentional interference with prospective advantage. Blatty claimed that the Times intentionally excluded Legion from the List even

though the Times was aware that Legion had sold more than enough copies to qualify for the List and that the novel was in all other respects fully qualified to be so included. Blatty alleged that the Times promoted and commercially marketed its Best Seller List as an accurate and objective measure of weekly book sales when the Times knew that the List was neither accurate nor objective.[1/] Blatty also alleged that the Times acted with full knowledge that exclusion from its Best Seller List would cause substantial economic harm to an author since the Times was aware that the List was heavily relied upon by booksellers in their marketing

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1/ The legend below the List read at the time of the suit (it has since been modified): "The listings above are based on computer-processed sales figures from about 2000 bookstores in every region of the United States." The Times contended that said legend did not contain a statement of fact.

of books. In fact, the Times promoted and commercially licensed use of the List for precisely such purposes. The advantages to authors whose books appear on the List are substantial because such books are more prominently displayed and are sold at a discount thus promoting more sales. App. 2-12.

The law and motion court sustained the Times' Demurrer to Blatty's First Amended Complaint and dismissed the Complaint without leave to amend.

The Court of Appeal reversed the trial court with respect to two counts of the First Amended Complaint, both of which claimed an intentional interference with prospective business advantage.[2/] App. 25, 60.

2/ The first such count was premised upon the actual publication of the Best Seller List in the New York Times and in the New York Times Book Review. The second count was premised upon the commercial promotion, marketing and licensing of that List by the Times to various booksellers throughout the world who then use the List as a device to

The three judge Appellate Court panel unanimously concluded that Blatty had properly alleged each element of the tort:

> "The elements of a cause of action for intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption thereof; and (5) damages to plaintiff proximately caused by the act of the defendant... The amended complaint sets forth each of these elements." App. 52-53.
>
> * * *
>
> "The tort of interference with prospective advantage lies for interference with relations which are merely prospective or potential. (See Buckaloo v. Johnson, supra, 14 Cal. 3d 815, 822; Smith v. Superior Court, supra, 151 Cal.App.3d 491, 501-502; Gold v. Los Angeles Democratic League (1975) 49 Cal.App.3d 365, 375.)" 3/ App. 56.

Fn. 2/ Cont.) to promote the sale of books appearing on the List.

3/ Gold involved an unsuccessful candidate

The Appellate Court unanimously concluded that the First Amendment did not create an absolute bar to such claims since the complaint alleged that the Times had falsely, and with knowledge of its falsity, represented its Best Seller List as accurate and objective, citing Gertz v. Welch, 418 U.S. 323, 340 (1974).

The California Supreme Court reversed the Court of Appeal's judgment with respect to the intentional interference claims. In so doing, the state high court held that the First Amendment was an absolute bar to those claims (and to other claims of unfair com-

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fn. 3/ Cont. for election who had been endorsed by the Democratic Party. Gold brought an action against the Los Angeles Democratic League alleging that the League mailed a pamphlet to prospective voters falsely implying that a competitor was the endorsed Democratic Party candidate. Gold's name was not mentioned. Gold alleged the misrepresentation was done knowingly and with intent to interfere with his opportunity to obtain votes of prospective voters held a cause of action was stated.

petition and false advertising) since Blatty had failed to allege that the false representations made by the New York Times were "of and concerning" him. App. 92, 93, 101, 102. The Court's discussion of the "of and concerning" requirement was necessarily grounded in defamation cases since it is that context to which this requirement is directly relevant. The Court concluded, however, that the "of and concerning" requirement must be applied to all injurious falsehood claims regardless of the context or of the nature of the underlying tort. App. 85. To do otherwise would increase the potential for lawsuits against the press, App. 86, 87, 91, and would pose "an unjustifiable" threat to society.[4/] App. 87.

4/ The dissent rejected this reasoning but concurred in the result, inexplicably asserting that intentional conduct was not alleged despite allegations directly on point. App. 109, 12-15.

REASONS FOR GRANTING THIS PETITION

A. This Unprecedented Decision Insulates the Press From Effects of Knowing Falsehood.

By a 4-3 margin, and for the first time in American jurisprudence, a court held that the First Amendment requires an "of and concerning" element for any cause of action involving a claim of injurious falsehood against a press defendant.[5/]

The effect of this holding is to insulate the press from liability for the ill-effects of even the knowing falsehood. This conclusion is based upon a misreading of this Court's decisions and, in fact, is quite inconsistent with several of those decisions.

5/ The California Supreme Court's decision appears to make a distinction between media and non-media defendants, e.g., App. 65, 66, 78 and 82. In Dun & Bradstreet v. Greenmoss Builders 472 U.S.____, 86 L.Ed.593, 105 S.Ct._____, (1985), at least 6 members of this Court rejected any such distinction. (L.Ed. 611, 618)

Unfortunately, considering the prestige of the California Supreme Court, the decision is bound to exert substantial influence on developments of the law in this context where there is already a complicated and confusing overlay of First Amendment considerations. The predictable result is the Frankenstein-like creation of a plethora of torts fabricated with weird and irrelevant appendages. This Court should intervene before the First Amendment is further subjected to such careless experimentation.

The decision of the California Supreme Court raises an important question of federal constitutional law: to what extent must specific First Amendment guidelines developed in the context of defamation be applied wholesale to tort causes of action that do not sound in defamation? The position of the California Supreme Court is that those

requirements must be applied jot for jot, bag and baggage, regardless of the relevance of the particular requirement to the underlying tort and regardless of any countervailing considerations. The breadth of the holding cuts a wide swath from invasion of privacy to interference with prospective advantage to unfair competititon to fraud to 10b5 violations or, for that matter, to any claim that happens to allege as a factual premise an injury caused by something a media defendant published.

For example, a newspaper columnist who lies in his financial column about a stock he owns to induce the public to buy it so its price will rise and he can sell at a profit would be insulated from liability because no purchaser-plaintiff will be able to show the falsehood was "of and concerning" him. Apparently, the result would be different if a businessman engaged in the

same scheme without the media being involved. See Fn. 5, supra.

B. Decision Directly Conflicts With Decision of United States Court of Appeals.

In addition, the decision of the California Supreme Court is in direct conflict with a recent decision of the United States Court of Appeals for the Fourth Circuit, Falwell v. Flynt, 797 F.2d 1270 (4th Cir.), rehearing in bank denied, 805 F.2d 484 (1986), cert. granted sub nom. Hustler Magazine v. Falwell, ___U.S.___, 55 U.S.L.W. 3661, March 30, 1987.

C. A Formalistic Invocation of State Grounds Should Not "Cert.-Proof" Decision and Preclude Review Where Decision in Fact Rests on Federal Grounds.

Finally, the California Supreme Court, while in fact relying on Federal cases to

reach its decision,[6/] appended a footnote at the very end of the majority opinion:

> "Throughout this opinion we have used 'First Amendment' to refer not only to that provision of the United States Constitution, but also to article I, section 2 of the California Constitution. It is the latter on which we primarily rely."

This Court should intervene to assert that the question of independent and adequate state grounds should be determined by what a state court does rather than what it says it did.

For these reasons, the importance of the questions presented and the conflict with a decision of a federal court of appeals, the Petition should be granted. Sup. Ct.

6/ The opinion actually invokes and relies upon the supremacy clause: "Under the supremacy clause a state's definition of a tort cannot undermine the requirements of the First Amendment." App. 99, 100.

Rule 17.1(b) & (c).

I. THE OPINION BELOW MISUNDERSTOOD AND MISAPPLIED THE FIRST AMENDMENT DECISIONS OF THIS COURT.

After a generalized discussion of the political and social importance of the First Amendment and of this Court's abrogation of strict liability in the context of defamation, the California Supreme Court stated, "In defamation actions the First Amendment also requires that the statement on which the claim is based must specifically refer to, or be 'of and concerning', the plaintiff in some way." App. 81. In so stating, the Court relied upon an unjustifiably broad interpretation of this Court's decision in Rosenblatt v. Baer, 383 U.S. 75 (1966).

From this bare premise, the California Supreme Court concluded that the "of and concerning" requirement must also be

satisfied whenever a plaintiff seeks redress for a non-defamatory injurious falsehood regardless of the nature of the underlying tort. App. 82, 83. The Court offered two reasons for this leap in logic:

(1) Something must be done to stop plaintiffs from successfully suing the press, or, in the words of the opinion:

> "In recent years plaintiffs suing press defendants have more frequently affixed labels other than defamation to injurious falsehood claims and have increasingly achieved some measure of success in these actions." App. 91.

(2) Only direct reference statements cause harm:

> "[t]he 'of and concerning' or specific reference requirement limits the right of action for <u>injurious falsehood</u>, granting it to those who are the direct object <u>of criticism</u> and denying it to those who merely complain of non-specific statements that

they believe cause them some hurt." App. 88. (Emphasis added.) 7/

The California Supreme Court's invocation of the First Amendment is wrong for at least three reasons. First, Rosenblatt does not support the broad contentions for which the California Supreme Court cites that decision. Next, to the extent Rosenblatt does impose an "of and concerning" limitation on defamation causes of action, this Court has never held that such a requirement must or even should be imposed on non-defamation torts. Indeed, this Court's rulings are quite to the contrary.

Although the First Amendment may apply to all tort claims premised on speech or publication, the scope and effect of

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7/ The underlined words expose the fallacy in the Court's reasoning - not all injurious falsehood is criticism. The formulation also assumes the plaintiff's allegations of damage are unfounded. That is not a question to be decided upon a pleading.

that application will depend on the specific nature of the interests at stake, not upon the incantation of platitudes and rules excised from other contexts. That was made abundantly clear in Time v. Hill, 385 U.S. 374, 390, 391 (1967), one of the first cases to interpret New York Times v. Sullivan, 376 U.S. 254 (1964), in a non-defamation case context:

> "...This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in New York Times [v. Sullivan] guide our conclusion, we reach that conclusion only by applying these principles in this discrete context." (Emphasis added.) 8/

Finally, in the discrete context of

8/ In Time v. Hill, this Court also made the salient point that: "The constitutional principles can tolerate sanctions against calculated falsehoods without significant impairment of their essential function." (at 389) (Emphasis added.) A calculated falsehood is precisely what was alleged herein.

this case, there is no basis in law, logic or commonsense for the imposition of the "of and concerning" requirement on the specific tort at issue here. A defendant can, with acts or words, intentionally and maliciously damage a plaintiff's economic relationships without ever making a direct reference to the plaintiff or to the plaintiff's property. The essence of the tort is not criticism of the plaintiff, but the intentional damaging of plaintiff's economic relationships, regardless of the method chosen. To require the "of and concerning" element in the context of this type of concern is simply inexplicable. Certainly the First Amendment imposes no such requirement.

A. Rosenblatt v. Baer Inapplicable.

The California Supreme Court misunderstood and, as a consequence, misapplied

the holding in Rosenblatt v. Baer, 383 U.S. 75 (1966). The California Supreme Court described that holding as follows:

> "In that case, the United States Supreme Court held that a defamation plaintiff could not constitutionally establish liability without satisfying the ["of and concerning"] requirement even though the governing state law imposed no such prerequisite: 'under New York Times...[the plaintiff is] required to show specific reference'." App. 82.

(quoting Rosenblatt; emphasis supplied by California Supreme Court). In fact, the Rosenblatt court decided a much narrower point, namely, that, after a full trial on the merits, "in the absence of sufficient evidence that the [alleged defamation] focused on the plaintiff, an otherwise impersonal attack on governmental operations cannot be utilized to establish a libel of those administering the operations." 383 U.S. at 80. (Emphasis added.)

The California Supreme Court's assumption that Rosenblatt applies beyond a defamation case involving a specific "attack on governmental operations" context is unwarranted and unexplained. Aside from its specific impact in this case, this assumption invites further complications in the already complex First Amendment overlay on defamation. In any event, that assumption is certainly not justified by the Rosenblatt Court's description of the precise rationale behind its holding:

> "The jury was permitted to award damages upon a finding merely that respondent was one of a small group acting for an organ of government, only some of whom were implicated, but all of whom were tinged with suspicion. In effect, this permitted the jury to find liability merely on the basis of his relationship to the government agency, the operations of which were the subject of discussion... A theory that the [publication] cast indiscriminate suspicion on the members of the group responsible

> for the conduct of this governmental operation is tantamount to a demand for recovery based on libel of government, and therefore is constitutionally insufficient.
> 383 U.S. at 82-82 (emphasis supplied)

Thus, although the Rosenblatt Court appeared to impose the specific reference element of defamation actions as a First Amendment requirement, it did so only in the context of generalized criticisms of governmental operations. This Court has never applied Rosenblatt beyond that narrow context.

The California Supreme Court, on the other hand, took Rosenblatt's very specific holding, generalized it and then leap-frogged that generalization into novel and more than somewhat illogical doctrine. Unfortunately, the California Supreme Court supplied neither reason nor direction in its cryptic, but substantial, expansion of

Rosenblatt.[9/]

B. First Amendment Does Not Require "Of and Concerning" Element to Be Added to Interference Tort.

Assuming arguendo that Rosenblatt v. Baer did establish a generally applicable "of and concerning" requirement for all defamation causes of action, no decision by this Court has ever indicated that the First Amendment requisites of a defamation cause of action must be applied mechanically to other non-defamation torts. Time v. Hill, supra.

In Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977),

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9/ The California Supreme Court's discussion of Rosenblatt is limited to two sentences. App. 81, 82. Hence, it is not possible to understand how that court arrived at its interpretation of Rosenblatt other than as a convenient means to achieve a desired result.

this Court made it quite clear that First Amendment limitations placed upon one tort are not automatically transferable to another. According to the Zacchini Court, the scope of First Amendment limitations to any particular tort action will depend on the specific nature of that tort and the state interests the tort is designed to advance or protect. Those factors will be counterposed against relevant First Amendment concerns to determine the nature and extent of any constitutional limitation.

Zacchini involved the memorable case of the "Human Cannonball" whose entire act, a fifteen second cannonshot through space, was aired by a local news broadcast. Mr. Zacchini sued the station for tortious appropriation of his right of publicity. The Ohio Supreme Court agreed that Mr. Zacchini did have such

right. However, relying heavily on Time v. Hill, supra, a case in which this Court applied the New York Times v. Sullivan actual malice standard to a cause of action for false light invasion of privacy, the Ohio Supreme Court disallowed Zacchini's right of publicity claim since it concluded that the broadcast was privileged under the First Amendment.

This Court reversed, holding that the rationale behind the protections afforded in Time v. Hill was not relevant to the right of publicity tort. In this regard, the Court noted significant differences between the privacy tort at issue in Time v. Hill and the right of publicity. These differences made transfer of First Amendment limitations from one tort to the other inappropriate.

"'The interest protected' in

> permitting recovery for placing the plaintiff in a false light 'is clearly that of reputation, with the same overtones of mental distress as in defamation'. [Citation] By contrast, the State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment. As we later note, the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation." 433 U.S. at 573.

Based on these distinctions, the Court concluded that the First Amendment did not require application of defamation's actual malice standard to the right of publicity tort. Neither it nor the premises upon which it was founded were relevant to that tort.

The tort at issue here, intentional interference with prospective business advantage, closely resembles the right of publicity at issue in Zacchini both in terms of a similarity of purpose and a shared dissimilarity

with the torts of false light invasion of privacy and defamation. With respect to both intentional interference with prospective business advantage and the right of publicity, the state has an interest in promoting economic activity and of rewarding and protecting those who are so engaged. Both torts are designed to accomplish just that. Moreover, neither tort is premised upon the protection of "feelings or reputation". 433 U.S. at 573. By way of contrast, both false light invasion of privacy and defamation are premised upon the protection of feelings and reputation. Hence, by a parity of reasoning with the Zacchini Court, the First Amendment limitations on defamation and privacy are not automatically transferable to a cause of action based upon intentional interference with prospective business advantage. The California Supreme Court's conclusion to the contrary is simply

wrong.

The California Supreme Court's decision is also inconsistent with this Court's opinion in Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974). Although that case involved the extent to which the First Amendment limited a defamation action brought by a private person, the approach and reasoning adopted by the Court seems particularly appropriate here. In essence, the opinion in Gertz represents an accommodation of the state's interest in protecting the reputation of private citizens with the First Amendment's protection of a free press. Before striking the appropriate balance, the Gertz Court observed:

> "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, wide-open' debate on public

issues." 418 U.S. at 340.

Hence, regardless of the balance struck, absolute protection of the knowing lie is never justified on First Amendment grounds.

C. California Supreme Court Failed to Balance Interests in Its Analysis.

Here, the California Supreme Court simply assumed that the prevention of lawsuits against the press was the paramount constitutional concern. App. 86-91. Thus, it concluded that a device or pleading limitation that would eliminate such lawsuits was not only a positive good, but a mandate of the First Amendment. The Court performed no balancing of the various interests at stake (e.g., it did not even mention Mr. Blatty's interest as an author to be free from unfair impingement of his First Amendment rights to express and disseminate his ideas); nor did

it consider that its rule protected the knowing falsehood published with a malicious intent. Neither the First Amendment nor any opinion by this Court requires such a result.

The scope of the court's decision here can best be appreciated by considering the total irrelevance of the "of and concerning" requirement to the interest at stake in a claim of intentional interference with prospective advantage. In the context of defamation, that requirement is designed to ensure that it is the plaintiff's reputation that has been impugned. The defamatory statement must refer to him. Placed in this context, the requirement does not undermine the legitimate state interest, rather it ensures that the state's interest in the protection of reputation is being advanced in a narrowly tailored fashion that does not unncessarily tread upon the First

Amendment. Stated in the converse, the state's interest in the protection of reputation is not materially advanced by permitting a person to sue based on a statement that does not expressly or implicitly refer to that person.

On the other hand, the "of and concerning" or specific reference requirement has no relevance to the state's legitimate interest in preventing the disruption of economic relationships. It is, quite simply, wholly out-of-place in that context. Rather than ensuring that the state's interest is advanced in a narrowly tailored fashion, the rule completely ignores the state's interest. Indeed, a mechanical application of this requirement is an invitation to disrupt such relationships through carefully planned subterfuge that scrupulously avoid reference to the potential plaintiff. True, imposition of the "of and concerning" rule will bar

lawsuits against the press, but with no more relevance than would a rule limiting the liability of the press to cases in which the plaintiff is over six feet tall.

As this Court held in Zacchini, the limitations imposed by the First Amendment in the context of defamation or the false light right of privacy need only be applied under circumstances in which there is some parity of purpose and design between those torts and the one to which application is being considered. There is absolutely no such parity here.

This is not to say that the First Amendment does not apply to the intentional interference with prospective business advantage alleged here. (In this case, actual malice has been alleged.) Rather, it is to suggest that the extent of its applicability must be determined in a manner which comprehends the basic purpose for

which the particular tort was created and which then gives due consideration to the interests being protected by that tort. The California Supreme Court in its rush to shield the media from "creative pleading" failed to take these significant factors into account.

D. The Decision of the California Supreme Court is in Conflict With a Recent Opinion By the United States Court of Appeals for the Fourth Circuit.

In Falwell v. Flynt, 797 F.2d 1270 (4th Cir.), rehearing in bank denied, 805 F.2d 484 (1986), cert. granted sub nom. Hustler Magazine v. Falwell, __U.S.__, 55 U.S.L.W. 3661, March 30, 1987, the Fourth Circuit Court of Appeals held that although the First Amendment applied to a claim for intentional infliction for emotional distress, its application would not be rigidly controlled by special rules developed in the

context of defamation. The role of the court was to assess the nature of the specific tort at issue and then to determine how the various elements of the tort should be limited, if at all, by an application of the First Amendment.

At issue in Falwell was an "ad parody" that had appeared in Hustler Magazine. The subject of the parody was Rev. Jerry Falwell. Included in the parody were a number of falsehoods, including details of an apocryphal incestuous rendezvous Falwell was said to have had with his mother. Falwell sued the publishers of Hustler claiming libel, invasion of privacy and intentional infliction of emotional distress. The invasion of privacy claim was dismissed by the trial court and the jury found in defendant's favor on the libel claim. However, the

jury returned a verdict favorable to Falwell for intentional infliction of emotional distress.

On appeal, the defendant argued that the First Amendment barred recovery for intentional infliction of emotional distress since Falwell, as a public figure, could not prove "actual malice". The Fourth Circuit agreed with defendants that Falwell was a public figure and that defendants were, therefore, entitled to the same level of protection they would have received in an action for libel. 797 F.2d at 1274. "To hold otherwise would frustrate the intent of New York Times and encourage the type of self censorship which it sought to abolish." Id. Having determined the level of protection, the question was what form that protection should take. In this regard, the Court concluded that a direct application of

the actual malice standard as developed in defamation law would be inappropriate. After tracing the history of the actual malice standard, the Court observed:

> "When applied to a defamation action, the actual malice standard alters none of the elements of the tort; it merely increases the level of fault the plaintiff must prove in order to recover in an action based upon a publication. Requiring a plaintiff to prove knowledge of falsity or reckless disregard of the truth in an action for intentional infliction of emotional distress would add a new element to this tort, and alter its nature." 797 F. 2d at 1275 (Emphasis added.)

In short, much like the approach adopted by this Court in Zacchini, the Fourth Circuit in Falwell concluded that application of the First Amendment would be determined by a careful assessment of the nature of the tort at issue. The Fourth Circuit went on to conclude that an action for intentional infliction of

emotional distress, as developed under Virginia law, met the requisite level of fault mandated by the First Amendment.

The California Supreme Court cited and discussed the Falwell decision. App. 98, 99. In so doing, it specifically rejected the reasoning and conclusions of the Fourth Circuit. App. 99, 100. Accordingly, the decision of the California Supreme Court is in direct conflict with a recent decision of a federal circuit court on the precise question presented by this Petition: to what extent does the First Amendment require that guidelines developed in the context of defamation be applied wholesale to tort causes of action that do not sound in defamation? The answer of the California Supreme court is that those guidelines must be rigidly enforced in non-defamation torts; the answer of the Fourth Circuit is that rigid application of the guidelines is

neither required nor appropriate. This Court should resolve the conflict.

On March 30, 1987, this Court granted the Petition for Certiorari in the Falwell case. The first question[10/] raised in that Petition asks this Court to determine which requirements of defamation actions are by reason of the First Amendment applicable to a non-defamation tort. That is the issue in the instant case albeit in regard to a different tort.

Considering the identity of the questions presented and considering the divergent approaches adopted by the respective courts, consolidation of this case with Falwell would seem particularly appropriate. Consolidation would give the Court an oppor-

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10/ "Are First Amendment defenses applicable to libel also applicable to claims of intentional infliction of emotional distress when such claims are based upon alleged injurious falsehoods." 55 U.S.L.W. 3649-50.

tunity to address in the context of two different torts and two different approaches, an important subject of constitutional law: First Amendment requirements in non-defamation cases.

II. THE FIRST AMENDMENT DOES NOT INSULATE A MEDIA DEFENDANT FROM LIABILITY FOR FALSE STATEMENTS IN MARKETING A PRODUCT.

The Second Cause of Action specifically excludes the normal sale of the newspaper and focuses on the List as a product. The N.Y. Times' false claim (that its Best Seller List is based on computer-processed sales figures from about 2000 stores in every region of the United States) may be the very thing that makes its List appear superior to other lists (which make no such claim) and, thus, enables the N.Y.Times to market the List as a product (apart from the newspaper) so successfully.

If a department store or an individual were to offer this product to bookstores based on such a false claim, there would be no question of the commercial nature of the speech.

The falsehood appears to be the basis of a multi-million dollar merchandising scheme and one which, unfortunately, holds economic life and death power over authors' books. App. 4, 5, 6. Had there been no list at all, Mr. Blatty's book would have been free to compete on its own merits. On that basis, it was selling excellently. App. 9, 10. It took the N.Y. Times false statements in connection with its Best Seller List to give an unfair competitive advantage to his competitors App. 9-12 to his resulting damage. That damage was never considered by the California Supreme Court. Allowing this suit for redress does not pose "an unjustifiabl threat to society". App. 87.

Bose v. Consumer's Union, 466 U.S. 485 (1984), 80, L.Ed. 2d 502; Virginia Board of Pharmacy v. Virginia Consumers Council, 425 U.S. 748 (1976) 48 L.Ed. 2d 346.

III. CALIFORNIA SUPREME COURT'S DECISION IS NOT BASED UPON AN INDEPENDENT AND ADEQUATE STATE GROUND.

A. The Footnote Disclaimer.

The aforementioned formalistic disclaimer,[11/] is undoubtedly intended to satisfy the requirement of Michigan v. Long 463 U.S. 1032, 1041 (1983) that the decision below is "alternatively based on bona fide separate, adequate and independent grounds".

11/ Toward the very end of its opinion, the 4 member majority added this footnote:

> "Throughout this opinion, we have used 'First Amendment' to refer not only to that provision of the United States Constitution, but also to article I, section 2 of the California Constitution. It is the latter on which we primarily rely."

The question is whether the existence of the state grounds is to be ascertained by what the state court does in fact or by what it says it did. The Court is presented with the converse of the now well-settled rule that "a state court cannot confer standing in that court", since it is the United States Constitution and Acts of Congress which set jurisdiction, not the preferences of courts of lower commission (Orr v. Orr, 440 U.S. 268, 277, fn. 7 (1979), discussing Doremus v. Board of Education, 342 U.S. 429, 434 (1952). Here, the question is, instead, whether a state court may deny jurisdiction to this Court by deciding a case on federal grounds but saying it did not.

The notion that state labels can prescribe this Court's jurisdiction is irreconcilable with holdings, rendered both before and after Long, establishing that the decision as to whether the state court was resolving an

independent state issue, on the one hand, or a federal issue (either solely or intertwined with state law), on the other hand, is for this Court. (See International Longshoremen's Assn. v. Davis, ___U.S.___, 106 S. Ct. 1904, 1910 (1986) and authorities collected there, and Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 1093 (1985)). This being so, this Court obviously is not bound by a state court's ipse dixit.

It is noteworthy that the Supreme Court of the nation's most populous state felt constrained to employ such an offhand and legalistic device. Had the court below been pursuing non-federal precepts or non-intertwined issues, one would have expected its decision to show that to be the case. Moreover, one would expect at least something more in the way of explanation, as distinguished from proclamation, as shown in decisions of some

other courts (see, for example, State v. Stroud, 720 P.2d 436 (Wash. 1986) Nor is there some reasonable reliance on state authority in the reasoning process of the court's opinion, a well-recognized indicator of independent state grounds (New York v. Class, ___U.S.____, 106 S.Ct. 960, 964 (1986), citing, inter alia, California v. Carney, supra, 471 U.S. 386, 105 S.Ct. 2066, 2068, fn. 1 (1985)).

B. The Opinion Relied Upon Federal Law.

The California Supreme Court's conclusion that the "of and concerning" requirement must be satisfied in all causes of action involving an injurious falsehood is unmistakeably premised upon the interpretation and application of federal case law. See App. 78 et seq.

The section of the opinion

addressing this point begins with a brief introduction that describes general and unassailable propositions regarding the breadth of protection afforded free expression. App. 78. Appropriate provisions of the federal and state constitutions are cited, as well as cases construing those provisions. Id. But beyond this introductory point, the focus of the Court's discussion is almost entirely on federal precedent. App. 79 - 91. Indeed, the only state case on which the court actually relies was itself decided on the basis of federal law. Reader's Digest Association v. Superior Court, 37 Cal.3d 244, 208 Cal. Rptr. 137, 690 P. 2d 610 (1984) (construing and applying Gertz v. Robert Welch, Inc., supra.)

Specifically, in concluding that the First Amendment required

imposition of the "of and concerning" requirement, the California Supreme Court relied primarily on New York Times v. Sullivan, supra and Rosenblatt v. Baer, supra. App. 81, 82. In addition to those authorities, seven other federal cases are cited and discussed. Bose Corporation v. Consumers Union, 466 U.S. 485 (1984); Herbert v. Lando, 441 U.S. 153 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 383 U.S. 374 (1967); Simmons Ford, Inc. v. Consumers Union, 516 F. Supp. 742 (S.D.N.Y. 1981); Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893 (W.D. Mich. 1980) affd. 665 F.2d 110 (6th Cir. 1981)

By way of contrast, there are only two citations to California authority in this section of the opinion.

Reader's Digest Association v. Superior Court, 37 Cal.3d 244, 208 Cal.Rptr. 137, 690 P.2d 610 (1984); Kapellas v. Kofman, 1 Cal.3d 20, 81 Cal.Rptr. 360, 459 P.2d 912 (1969). As noted, the former was premised completely on federal decisions and the latter is cited at the end of a string of citations for the irrelevant proposition that actual malice must be established in a claim of false light invasion of privacy.

Most importantly, at no point during this discussion does the California Supreme Court even make a pretense of carving a decision that goes beyond the federal authorities. Indeed, in the discussion of Falwell v. Flynt, supra, a federal case with which the California Supreme Court disagreed, there is no suggestion that the disagreement is premised

upon an interpretation of the California Constitution that is arguably broader than the federal constitution. App. 98, 99, 100. Rather, the California Supreme Court's disagreement with the Falwell court involves an interpretation of federal law where the California court specifically invokes the supremacy clause. App. 99, 100. See Fn. 6 Supra. In sum, the only rational interpretation of the California Supreme Court's opinion is that the result was mandated by federal constitutional law.[12/]

12/ This interpretation of the opinion is bolstered by the headnotes found in the official and unofficial reporters. 42 Cal.3d at 1034-36, ___P.2d at ___ to___, 232 Cal.Rptr. at 543 to 545. Although these headnotes are not officially part of the case, they do provide insight into future interpretations and applications of this decision. In each of the headnotes pertinent to the issues raised here, the decision and specific point is described as a construction of the First Amendment to the United States Constitution. Most importantly, in no headnote in any of the reports is the California Constitution ever cited.

C. Michigan v. Long.

The footnote disclaimer (see note 11, supra,) is ambiguous and only muddies the turbulent waters Michigan v. Long, 463 U.S. 1032 (1983) intended to calm.

In Long, this Court voiced its concerns regarding the difficulty of determining whether state court decisions rested on state or federal grounds when a state court decision relies upon both state and federal precedent. All too often federal and state law grounds were intermixed, leaving the basis for the decision unclear and the propriety of this Court's jurisdiction unreasolved. 463 U.S. at 1040. The need for constant clarification imposed a burden on state courts and their ability to develop state law unimpeded; on the other hand, outright dismissal of such cases undermined the "important need for uniformity in federal law." Id.

Because of these concerns and the related implications for judicial review and principles of federalism, this Court concluded that the then prevalent practice of remanding for clarification could no longer be justified. A middle ground between that practice and outright dismissal was needed. The Court stated,

> Accordingly, when as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

463 U.S. at 1040-41.

That presumption is fully applicable here. Any fair reading of the opinion of the California Supreme Court indicates that it rests primarily, if not exclusively, on federal law. Indeed, much like the decision

of the Michigan Supreme Court in Long, the overall thrust of the opinion here is grounded in federal precedent. Undoubtedly this decision will be interpreted by future courts and litigants as an application of federal law. See note 12, supra. This Court should treat it as such.

Of course, as this Court in Michigan v. Long made clear, the presumption that a decision rests on federal grounds can be rebutted by inclusion of a "plain statement" indicating that state and not federal law controlled the outcome of the decision. The Long Court stated,

> If a state court chooses merely to rely on federal precedent as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. . . . If the state court decision indicates clearly and expressly that it is alterna-

> tively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

463 U.S. at 1041. The California Supreme Court's equivocal disclaimer does not qualify as a clear and express statement of the grounds of decision. At most it confuses matters and leaves both state and federal law in an ambiguous posture.

First, nothing in the purported disclaimer makes it clear that federal cases "are being used only for purposes of guidance, and do not themselves compel the result that the court has reached." The opinion itself, taken as a whole, certainly suggests a much broader role for the federal precedent. In the absence of a more specific statement to the contrary, one can hardly be faulted for continuing to adhere to this most logical presumption.

Moreover, even if the California

Supreme court is relying primarily on the state constitution, it remains unclear whether that constitution is being interpreted and applied by force of the federal precedents cited and discussed or whether those precedents are merely being used as persuasive authority in the interpretive process. Thus, while it may be true that this case is primarily a construction of the California Constitution, it appears that, in the opinion of the California Supreme Court, this construction is mandated by federal case law.

Hence, even accepting the "plain statement" found in the footnote at the end of the Court's opinion, the decision is not independent of federal law. Rather, the California Constitution has been construed in a particular manner by force of federal law. See Fn. 6 supra.

Second, the footnote disclaimer does not "clearly and expressly [indicate] that it is alternatively based on bona fide separate, adequate and independent grounds". Far from clear and express, the footnote disclaimer read in the context of the overall decision is a bundle of ambiguity. Moreover, this ambiguity, if adequate under Michigan v. Long, gives the California Supreme Court the best of both worlds. Its decision is insulated from review by this Court, yet the actual basis for the decision is sufficiently ambiguous to operate as a potential precedent in the development of federal constitutional law. See footnote 12, supra.

This is precisely the type of ambiguity Long sought to eliminate. In a sense, the California Supreme Court has undermined Long by paying lip service to Long's requirement of a plain statement.

An analysis of the opinion reveals it derives wholly from the force of federal constitutional law. With the addition of the disclaimer, the clarity is diminished by a suggestion that to some unarticulated extent, California authority may have provided the guiding principles. Hence, this Court, as well as future courts and litigants, are served a hodgepodge of federal and state law, the basis of decision not clearly resting on either.

The California Supreme Court's attempt to comply with Long while at the same time it undermines the very foundations of that decision does not establish a bar to this Court's jurisdiction. Rather, this attempt at judicial legerdemain provides a separate and substantial basis for this Court's intervention. If Long is to retain any vitality, this Court should make it clear

that the California Supreme Court has not satisfied the most basic requirements of that decision.

IV. CONCLUSION.

The California Supreme Court erroneously held, by a 4 to 3 margin, that the First Amendment requires that the "of and concerning" element of a defamation cause of action must, by force of the Supremacy Clause of the United States Constitution, be satisfied in any case in which there is a factual allegation of injurious falsehood. This is so regardless of whether the "of and concerning" element is an element of the specific tort at issue; and, according to the California Supreme Court, it remains true even if the engrafted element has no relevant bearing upon the interests being advanced by that tort. Unfortunately, considering the prestige of the California

Supreme Court, the decision is bound to reverberate throughout the other forty-nine states and within the federal circuits.

So long as the decision of the California Supreme Court remains unreviewed, it casts a long shadow over the development of tort law both within the State of California and throughout the nation. Whenever a media defendant is sued, the flag of New York Times v. Sullivan will be waved to obscure the legitimate issues presented. The Petition for a Writ of Certiorari should be granted in order to eliminate the potential pernicious effect of this decision.

Respectfully submitted,

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86 1803

No. _____

Supreme Court, U.S.
FILED
MAY 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM PETER BLATTY,

Petitioner,

vs.

NEW YORK TIMES COMPANY, and DOES 1 through 10, inclusive,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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Vol. II of II

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NO. WEC 082071

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WILLIAM PETER BLATTY

Plaintiff

vs.

NEW YORKS TIMES COMPANY,

DOES 1 through 10, inclusive,

Defendants.

FIRST AMENDED COMPLAINT FOR DAMAGES

1. & 2. INTENTIONAL INTERFERENCE WITH PROSPECTIVE ADVANTAGE;

3. UNFAIR COMPETITION IN VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTIONS 17200 - 17208;

4. FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTIONS 17500-17520;

5. BREACH OF PUBLIC DUTY AND TRUST TO REPORT THE NEWS FAIRLY AND HONESTLY WITHOUT BIAS OR PREJUDICE.

GENERAL ALLEGATIONS

1. Plaintiff WILLIAM PETER BLATTY ("Blatty") is and, at all times mentioned herein, was an individual residing in the County of Los Angeles, State of California. Blatty is an author of a number of works of fiction, including "The Exorcist" and a recent novel entitled "Legion". Blatty owns valuable rights in and to "Legion" and to revenues from the sale of each copy of "Legion".

2. Defendant NEW YORK TIMES COMPANY is and, at all times mentioned herein, was a corporation duly organized and existing under the laws of the State of New York and owns, publishes and distributes a newspaper known as the New York Times, which is distributed by the New York Times Company and sold through the mails and through local news vendors to persons residing in the County of Los Angeles, State of

California.

3. Plaintiff is ignorant of the true names and capacities, whether individual, corporate, associate or otherwise, of Defendants sued herein as Does 1 through 10, inclusive, and, therefore, sues these Defendants by such fictitious names. Plaintiff will amend the Complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and, based thereon, alleges that each of the fictitiously named Defendants is responsible in some manner for the occurences herein alleged and that Plaintiff's damages as herein alleged were proximately caused by their conduct.

4. Plaintiff is informed and believes and, based thereon, alleges that at all times herein relevant, Defendants, and each of them were the agents, servants and employees of each other, and were, at all

times herein relevant, acting in the course and scope of said agency, service and employment.

5. During 1983, Defendants published a list in the New York Times entitled "Best Sellers" (the "List") purporting to rank best selling books, fiction and non-fiction, based on actual sales. The List was published and purportedly updated weekly in the New York Times.

6. Although the List purports, and purported, to rank books on the basis of sales and not on the basis of the literary merits of a particular work, the List has and had a substantial influence on the purchase and promotion of the books by booksellers and on the purchase of the books by the general public. Many persons purchase current novels and many book-sellers promote current novels, primarily or substantially because such novels are

included on the List. Many bookstores discount books appearing on the List and display the books in their stores more prominently than books not on the List. Thus, books included on the List sell substantially more copies than unlisted books due in substantial part to their inclusion on the List. Such sales enhance the sale of later paperback editions of such books and of movie rights to such books. Defendants knew that the List had and has such influence.

7. Because of the foregoing, authors whose books appear on the List have a significant and valuable prospective business advantage with respect to promoting and maximizing sales of such books and of later paperback editions of such books and of movie rights to such books (the "Prospective Advantage").

8. At all times relevant hereto,

Defendants expressly and impliedly advertised and represented to authors, booksellers and the general public that the List was an objective, unbiased and accurate compilation of actual sales of books each week by 2000 bookstores in every region of the United States. At the time it made such representations, Defendants knew them to be untrue. Since the instant suit was filed, Defendants have changed the express representation to reflect that the List is "statistically adjusted to represent sales in all bookstores".

9. Defendants merchandise the List for their own benefit. The aforesaid influence the List has on the purchase and promotion of books and of the paperback editions and on the exploitation of movie rights enhances the Defendants' ability to sell advertising to publishers and major chain bookstores.

Defendants sell separate subscriptions to the New York Times Book Review (the "Book Review") which contains the List. Defendants promote a telephone number which may be called to obtain the names of the books on the List. Defendants syndicate and sell the List as a service to persons and publications throughout the world.

10. At all times relevant herein, Defendants knew the List was not an objective, unbiased or accurate reporting of actual sales as represented because, at all times relevant herein, inter alia:

(a) Defendants did not use actual sales in compiling the List but rather used an undisclosed method of "weighting" certain sales more than others;

(b) To obtain sales figures from bookstores, Defendants sent to the bookstores forms (the "Forms") which

Defendants prepared; the Forms for works of fiction contain and contained a printed list of 36 "bestselling" books which has and had the effect of encouraging reports as to sales of books listed on the Forms and discouraging reports as to sales of books not listed on the Forms;

(c) Although the List purports to be updated weekly, Defendants mailed out four weeks of Forms at a time so that the printed list on the Forms was changed only monthly, not weekly;

(d) Defendants mailed, in the same envelope with the Forms, printed matter promoting books listed on the Forms, knowing and intending that such promotion would affect the reports from the book-stores and give books so promoted an unfair advantage over those not mentioned in the material sent by Defendants;

(e) Defendants made no effort

to investigate, check or review the sales figures supplied by the bookstores to confirm the accuracy of sales which were reported on the Forms and, lacking any such controls, had no method of determining whether the sales figures were accurately reported.

11. Blatty authored, and Simon and Schuster, Inc. published in 1983, a work of fiction entitled "Legion" which sold more than sufficient copies in the relevant time periods to warrant inclusion on the List for many weeks during the summer of 1983 and otherwise met all criteria for such inclusion during said time. During said time period, "Legion" appeared on the best sellers lists of other well-known publications, including Publishers Weekly, Time Magazine, the Chicago Tribune and the Los Angeles Times.

12. Though available for sale in bookstores in June and July 1983, and, in fact, selling in "Best Seller" quantity during June and July, "Legion" did not appear on Defendants' Forms sent to bookstores for reporting purposes for those months.

13. Acting on Blatty's behalf, Simon and Schuster, Inc., in or about July and August, 1983, contacted management employees of Defendants and provided information that "Legion" had sold more than sufficient copies to warrant inclusion on the List, and, in fact, had sold more copies than another book published by Simon and Schuster, Inc., which was on the List. Simon and Schuster, Inc. also told Defendants it had the sales figures which would substantiate that "Legion" qualified for the List. Defendants recklessly and/or intentionally failed and

refused to review Simon and Schuster, Inc.'s figures.

14. Defendants did list the novel "Legion" on their August Forms but misspelled the title and sent the August Forms to the booksellers with printed matter promoting books other than "Legion".

15. Despite the information provided by Simon and Schuster, Inc. management employees of Defendants, acting in the course and scope of their employment and knowing that the List had and has substantial influence on booksellers and the general public and that Blatty would be deprived of the Prospective Advantage, intentionally or recklessly and without cause refused to include "Legion" on the List for many weeks thereafter. In or about September 1983, Defendants included "Legion" on the List for one week only and then in the last position on the List.

Prior and subsequent to that publication, Defendants intentionally or recklessly and without cause excluded "Legion" from the List, while continuing expressly and impliedly to represent the List to be an objective, unbiased and accurate compilation of actual sales.

FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE ADVANTAGE

16. Blatty hereby incorporates by reference paragraphs 1 through 15 above.

17. As a direct and proximate result of Defendants' actions, Blatty was deprived of the aforesaid Prospective Advantage he otherwise would have obtained.

18. As a further direct and proximate result of Defendants' actions, Blatty has sustained, and will continue to sustain, damages due to lost sales and higher promotional expenses for "Legion", lost value

in the paperback editions and lost value in movie rights, all in excess of $3,000,000.

19. Defendants acted maliciously and in conscious disregard of Blatty's rights and with the intent and purpose of depriving Blatty of his rights and property in refusing to include "Legion" on the List for many weeks for which it qualified. Therefore, in addition to actual damages, Blatty seeks exemplary and punitive damages in an amount sufficient to make an example of and punish the Defendants but not less than $5,000,000.

SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR INTENTIONAL INTERFERENCE WITH PROSPECTIVE ADVANTAGE

20. Blatty hereby incorporates by reference paragraphs 1 through 15 above and 17 through 19 above except for those allegations relating to Defendants' publication of the List in the New York Times news-

paper or in the Book Review. Defendants' conduct in that regard is expressly excluded from this Cause of Action.

21. Defendants republished the List separate and apart from its publication in the New York Times or The Book Review. Defendants promoted, sold, syndicated and licensed the List, and reproductions of the List, in California and throughout the world. Defendants furnished or licensed to bookstores and to booksellers "blow-ups" of the List for public display. Defendants sold or licensed the List, or reproductions of the List, as a service to vendors and other persons in California and throughout the world.

22. In all of these activities, during June, July, August and September, 1983, Defendants excluded "Legion" from the List for many weeks for which it qualified to be included. Defendants only included "Legion"

on the List for one week when, in fact, it qualified to be included on the List for many other weeks during that period. Defendants knowingly and falsely represented to booksellers and to potential purchasers of "Legion" that the book was not a Best Seller for those periods when in fact it was.

THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR UNFAIR COMPETITION IN VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTIONS 17200 - 17208

23. Blatty hereby incorporates by reference paragraphs 1 through 15 and 21 and 22 above.

24. The aforesaid representations by Defendants concerning the List constituted unlawful, unfair and fraudulent business practices and unfair, deceptive, untrue and misleading advertising which deceived consumers as to the popularity of books available for sale, all in violation of

California Business and Professions Code Sections 17200 et seq.

25. As a direct result thereof, many booksellers and consumers who otherwise would have purchased "Legion" did not do so and purchased other books in competition with "Legion" and, due to the false representations concerning the accuracy of the List, many persons and publications which otherwise would not have done so purchased the List, The Book Review and The New York Times newspaper and advertisements therein. Many booksellers and consumers were misled and deceived by the omission of "Legion" from the List for all but one week during the period June through September, 1983 and influenced by, and relying upon the List, were not interested in, and did not purchase or promote "Legion".

26. As a further and direct and proximate result of the New York Times Company's

actions, Blatty sustained damages of more than $3,000,000 due to lost sales for "Legion" and in lost value for the paperback edition and the movie rights.

27. Defendants acted maliciously and in conscious disregard of Blatty's rights and with the intent and purpose of depriving Blatty of his rights and property in refusing to include "Legion" on the List on weeks where it otherwise qualified. Defendants acted maliciously and in conscious disregard of the rights of booksellers, consumers and the general public and with the intent and purpose of depriving them of their rights and property by refusing to reveal that the List was not an objective, unbiased and accurate reporting of actual sales as Defendants had represented. Therefore, in addition to actual damages, exemplary and punitive damages are sought in an amount sufficient

to make an example of and punish the Defendants but not less than $5,000,000.

FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR FALSE AND MISLEADING ADVERTISING IN VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTIONS 17500 - 17572

28. Blatty hereby incorporates paragraphs 1 through 15, 21, 22 and 25 above.

29. Defendants made, disseminated, and caused to be made and disseminated, the aforesaid representations concerning the List before the public in California in its newspaper and in other publications circulated in California and elsewhere. At all times, Defendants knew that said representations were untrue and misleading and would mislead the public as to the accuracy of the List and as to the identity of best selling books and would affect the sales of "Legion" and other books selling in competition to "Legion as well as sales

of the List, The Book Review and the New York Times newspaper.

30. Defendants' aforesaid representations constituted false and misleading statements in violation of California Business and Professions Code Section 17500 et seq.

31. As a direct result of Defendants' aforesaid conduct, many booksellers and consumers who otherwise would have purchased or promoted "Legion" did not do so and purchased and promoted other books selling in competition with "Legion", and, due to the false representations concerning the accuracy of the List, many publications and persons purchased the List, Book Review and the New York Times newspaper and advertisements therein who otherwise would not have done so.

32. As a further and direct and proximate result of the Company's actions,

Blatty sustained damages of more than $3,000,000 due to lost sales for "Legion" and to lost value for the paperback edition and the movie rights.

33. Defendants acted maliciously and in conscious disregard of Blatty's rights and with the intent and purpose of depriving Blatty of his rights and property in refusing to include "Legion" on the List on weeks when it otherwise qualified. Defendants acted maliciously and in conscious disregard of the rights of book-sellers, consumers and the general public and with the intent and purpose of depriving them of their rights and property by refusing to reveal that the List was not an objective, unbiased and accurate reporting of actual sales as Defendants had represented. Therefore, in addition to actual damages, exemplary and punitive damages are sought in an amount

sufficient to make an example of and punish the Defendants but not less than $5,000,000.

FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR BREACH OF PUBLIC DUTY AND TRUST TO REPORT THE NEWS FAIRLY AND HONESTLY WITHOUT BIAS OR PREJUDICE

34. Blatty hereby incorporates by reference paragraphs 1 through 15, 21, 22, 25, 29 and 31 above.

35. At all times mentioned herein, Defendants had a public duty or trust to sell or distribute newspapers to the public containing a fair and honest report of all news without bias or prejudice.

36. Defendants' aforesaid conduct and representations concerning the List constituted a breach of said duty or trust.

37. As a direct and proximate result thereof, many persons and booksellers who otherwise would have purchased or promoted "Legion" did not do so and purchased or promoted other books instead, and due to

the false representations concerning the accuracy of the List, many persons and publications which otherwise would not have done so purchased the List, The Book Review and the New York Times newspaper.

38. As a further direct and proximate result of the Defendants' actions, Blatty sustained damages of more than $3,000,000 in lost sales for "Legion" and in lost value of paperback and movie rights.

39. Defendants acted maliciously and in conscious disregard of Blatty's rights and with the intent and purpose of depriving Blatty of his rights and property in refusing to include "Legion" on the List on weeks when it otherwise qualified. Defendants acted maliciously and in conscious disregard of the rights of booksellers, consumers and the general public and with the intent and purpose

of depriving them of their rights and property by refusing to reveal that the List was not an objective, unbiased and accurate reporting on actual sales as Defendants had represented. Therefore, in addition to actual damages, exemplary and punitive damages are sought in an amount sufficient to make an example of and punish the Defendants but not less than $5,000,000.

WHEREFORE, Plaintiff William Peter Blatty prays for judgment against defendants as follows:

As to each cause of action:

1. For actual damages in excess of $3,000,000;

2. For exemplary and punitive damages in an amount not less than $5,000,000;

3. For costs of suit;

//

//

4. For such other and further relief as the Court may deem proper.

Dated: April 23, 1984.

COLEMAN & FARRELL
A Professional Corporation

By /s/
RICHARD M. COLEMAN
Attorneys for Plaintiff
WILLIAM PETER BLATTY

Court of Appeal-Second District
FILED - Dec. 12, 1985
Clay Robbins, Jr. Clerk

Deputy Clerk

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE

OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WILLIAM PETER BLATTY, Plaintiff and Appellant, v. NEW YORK TIMES COMPANY, Defendant and Respondent.	Nos. B008737 and B0010053 (Superior Court No. WEC 82071)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County. Laurence J. Rittenband, Judge. Judgment affirmed in part and reversed in part with

directions; appeal from order dismissed.

Coleman & Farrell and Richard M. Coleman for Plaintiff and Appellant.

Gibson, Dunn & Crutcher, Richard P. Levy, Gail E. Lees and William C. Foutz, and David A. Thurm, for Defendant and Respondent.

William Blatty sued the New York Times Company for damages on several theories, all of which were based on defendant's failure to include in its best seller list a book written by plaintiff. The trial court sustained defendant's general demurrer to the first amended complaint without leave to amend. Plaintiff appeals from the ensuing judgment of dismissal. (No. B008737.) He also appeals from order denying his motion

to tax costs made after judgment.[1] (No. B010053. Pursuant to plaintiff's motion we ordered that the appeals be consolidated.

FACTS

I

ORIGINAL COMPLAINT AND PROCEEDINGS THEREON

The original complaint contained four causes of action. The first cause of action (negligent interference with prospective business advantage) included the following allegations: Defendant owns, publishes and distributes the newspaper New York Times and publishes weekly therein a list entitled "Best Sellers" purporting to rank best selling books, fiction and nonfiction, based on actual

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[1] The order is appealable. (Code Civ. Proc., § 904.1, subd. (b); Lacey v. Bertone (1949) 33 Cal.2d 649, 654; Jimenez v. City of Oxnard (1982) 134 Cal. App.3d 856, 858, fn. 3.)

sales. Authors whose works appear on the list have a significant and valuable prospective business advantange in promoting and maximizing the sales of such books in both hardback and paperback editions, and the sale of movie rights to such books. Although the list purports to rank books on the basis of sales and expresses no opinion on their merits, the reputation of the New York Times and its perceived expertise in literary matters are such that many book sellers promote, and many persons purchase, current works of fiction primarily because they are included in the list. Defendant knew or should have known that the list has such influence on the sale and promotion of books. Plaintiff authored, and Simon and Schuster published, a new work of fiction entitled "Legion" which sold more than sufficient copies to warrant inclusion in the list and otherwise

met all criteria for such inclusion. Defendant negligently failed to include "Legion" in the list, thereby depriving plaintiff of the prospective advantage which he otherwise would have obtained.

The second cause of action (intentional interference with prospective business advantage) alleged: Acting on plaintiff's behalf, Simon and Schuster provided defendant's management employees with information that "Legion" had sold more than sufficient copies to warrant inclusion in the list, and requested that "Legion" be included; despite such information defendant, intentionally or recklessly and without cause, refused to include "Legion" in the list; as a result plaintiff suffered damage by loss of the advantage he otherwise would have obtained.

The remaining causes of action (negligence and trade libel) incorporated most

of the foregoing allegations of the first and second causes of action.

Less than two months after filing the complaint plaintiff noticed the taking of depositions and the production of documents. Thereafter, defendant filed a general demurrer to the complaint. Plaintiff moved for an order compelling the taking of the depositions and the production of documents previously noticed, asserting his right to discovery despite the pendency of the demurrer. In support of the motion plaintiff submitted his declaration which incorporated by reference an attached newspaper article presumably intended to show the relevancy of the proposed discovery. The newspaper article caused the trial court to question the allegation that defendant refused to include "Legion" in the best seller list despite the information furnished to it

by Simon and Schuster. The court stated that it could not rule on the demurrer until it was sure that such allegation was supported by admissible evidence. Accordingly, on the court's insistence and over plaintiff's objection, the parties took depositions of an employee of Simon and Schuster and an employee of defendant limited to the issue of the nature of information about sales of "Legion" allegedly supplied by Simon and Schuster to defendant.

The court took judicial notice of the depositions and concluded they contained no evidence that Simon and Schuster supplied defendant with any figures of sales of "Legion". The demurrer to the second cause of action was sustained with leave to amend to allege facts showing that (1) defendant "violated its public duty or trust to sell or distribute its newspaper

to the public containing a fair and honest report of all news without bias or prejudice"; and (2) defendant had in its possession reports of the actual sales of "Legion" which would qualify the book for inclusion in the best seller list and nevertheless deliberately refused to list it.[2] The demurrer to the remaining causes of action was sustained without leave to amend on the ground that defendant had no duty to include a book in the list except as indicated above, and those causes of action did not allege facts showing such

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[2] The court clarified its ruling as follows: ". . .2. As to the second cause of action, if the new facts to be alleged also are sufficient to support other causes of action, the complaint may so allege. [¶] 3. The court is limiting the plaintiff to a cause of action for an intentional omission of Legion from the 'Best Seller List' by the New York Times despite its knowledge that the sales of the book to the public qualified it for inclusion on the list." (Original emphasis.

a duty.

II

FIRST AMENDED COMPLAINT
AND PROCEEDINGS THEREON

In the amended complaint plaintiff again attempted to state a cause of action for intentional interference with prospective advantage, and set forth three additional theories of liability.

The first and second cause of action (both labeled intentional interference with prospective advantage) repeated in essence the allegations of the original complaint regarding defendant's publication of the best seller list and the prospective advantage accruing to authors whose books appear on the list. They further alleged: Defendant expressly and impliedly advertised and represented to authors, book sellers and the general public that the list was an objective, unbiased and

accurate compilation of actual sales of books each week by 2,000 book stores in every region of the United States. Defendant knew such representation was false because, among other things, defendant did not use actual sales in compiling the list but rather used an undisclosed method of "weighting" certain sales more than others. In July or August 1983 Simon and Schuster, acting on plaintiff's behalf, contacted management employees of defendant and told them it had sales figures showing that "Legion" qualified for the list. Defendant intentionally, or recklessly and without cause, refused to review such figures and to include "Legion" in the list for many weeks thereafter. In September 1983 defendant included "Legion" in the list for one week only, and then in last position. As a result of defendant's acts

plaintiff was deprived of the prospective advantage which he otherwise would have obtained; he thereby sustained damages in excess of $3 million through lost sales of and higher promotional expenses for "Legion", lost value in paperback editions and lost value in movie rights. Defendant acted maliciously and with intent to deprive plaintiff of his rights and property by refusing to include "Legion" in the list for many weeks during which it qualified for inclusion. Accordingly, plaintiff is entitled to punitive damages of not less than $3 million.[3]

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[3] The second cause of action differs from the first only by the addition of allegations that defendant republished the best seller list separate and apart from its publication in the New York Times and the New York Times Book Review, and promoted, sold, syndicated and licensed the list throughout the world as a service to vendors and other persons; defendant also furnished to book stores and book sellers "blow-ups" of the list for public display.

Each of the subsequent causes of action incorporated most of the foregoing allegations. The third and fourth causes of action (unfair competition, and false and misleading advertising, respectively) alleged that defendant's representations concerning the list constituted fraudulent business practices, false and misleading statements, and untrue and misleading advertising which deceived consumers as to the popularity of books available for sale, all in violation of Business and Professions Code section 17200 et seq. and section 17500 et seq. As a result many book sellers and consumers who otherwise would have purchased "Legion" did not

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Cont. of fn. 3:

Plaintiff states that the purpose of such allegations is to focus on defendant's commercial activities in advertising and marketing the list.

do so and instead purchased other books in competition with "Legion". Plaintiff thereby sustained damages in excess of $3 million. The fifth cause of action, apparently based on the court's comments in sustaining the demurrer to the complaint, alleged that defendant had a public duty or trust to sell and distribute newspapers containing a fair and honest report of all news without bias or prejudice; defendant's conduct and representations concerning the list constituted a breach of such duty which caused plaintiff to sustain damages of more than $3 million.

Defendant demurred generally to the amended complaint on grounds that each cause of action is barred by the First Amendment to the United States Constitution and Article I, Section 2 of the California Constitution, and the facts pleaded do not state a cause of action

on any of the theories set forth. The demurrer was sustained without leave to amend on the grounds stated. Judgment was entered dismissing the action.

DISCUSSION

I

APPEAL FROM JUDGMENT OF DISMISSAL

Plaintiff contends the original complaint as well as the amended complaint stated valid causes of action. While an appellate court ordinarily will not consider the allegations of a superseded complaint (see Foreman & Clerk Corp. v. Fallon (1971) 3 Cal.3d 875, 884), that rule is inapplicable where the trial court denied plaintiff leave to include those allegations in an amended complaint. (Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 209.) The trial court here sustained

the demurrer to the complaint without leave to amend as to all causes of action except intentional interference with prospective business advantage, limiting an amended complaint to that cause of action and any other that could be stated consistent with the court's ruling. Accordingly, the allegations of the complaint are reviewable insofar as they attempted to state causes of action for negligent interference with prospective business advantage, negligence and trade libel.

A legal duty to use due care is a necessary element of a negligence action. (Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal.3d 49, 54, fn. 3.) The determination of duty is primarily a question of law; it is the court's "'expression of the sum total of those considerations of policy which lead the law to say that

the particular plaintiff is entitled to protection.' [Citation.]" (Weirum v. RKO General, Inc. (1975) 15 Cal.3d 40, 46.) In J'Aire Corp. v. Gregory (1979) 24 Cal.3d 799, 804, the Supreme Court set forth six criteria for determining whether a duty of care is owed: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm. In connection with the last factor, countervailing public policies which may preclude recovery must also be considered. (Id., at p. 804, fn. 1.)

Assuming a sufficiently close connection between defendant's conduct and plaintiff's injury and that the harm to plaintiff was foreseeable, the other factors compel the conclusion that defendant owed no duty to plaintiff to include his book in its best seller list. The complaint did not specifically allege that the omission of the book from the list was intended to affect plaintiff, and no facts are alleged which show such an intent on defendant's part. Further, no facts are pleaded from which it may be inferred that defendant's conduct was morally blameworthy. The complaint alleges that defendant failed to include plaintiff's book in its best seller list despite knowledge that it "sold more than sufficient copies to warrant inclusion and otherwise met all criteria for inclusion." The complaint fails to

allege how it was determined that enough copies of the book were sold to warrant its inclusion, or what other criteria were met and by whom they were established. For all that appears defendant, for reasons of its own and employing criteria different from those which plaintiff considered to be conclusive, deemed the book unqualified for inclusion in the list. Public policy factos also weigh against imposition of such a duty. The list is a means of informing the public of the relative popularity of current works of fiction and nonfiction. If defendant were held to owe a duty to plaintiff to include his book in its list, other authors could assert a like duty owed to them. Faced with such a situation defendant might well cease compilation and publication of the list, thereby depriving the public of a

valuable service. For all of these reasons we conclude as a matter of law that defendant owed plaintiff no duty to include his book in its best seller list. It follows that the complaint does not state causes of action for either negligent interference with prospective advantage or negligence.

Trade libel is defined as "an intentional disparagement of the qualiry of property, which results in pecuniary damage to plaintiff." (Erlich v. Etner (1964) 224 Cal.App.2d 69, 73.) "The distinction between libel and trade libel is that the former concerns the person or reputation of plaintiff and the latter relates to his goods." (Shores v. Chip Steak Co. (1955) 130 Cal. App.2d 627, 630.) The complaint fails to state a cause of action for trade libel. Such libel allegedly consisted

of defendant's intentional and false omission of "Legion" from its best seller list. Silence is not libel. (Pond v. General Electric Co. (9th Cir. 1958) 256 F.2d 824, 827, cert. den., 358 U.S. 818 [3 L.Ed.3d 60, 79 S.Ct. 30].) "[T]he law does not recognize libel by omission as a tort. Libel, by definition, consists of the publication of a false and unprivileged fact. Thus, liability may be imposed in a libel case only for an assertion or implication of fact that is false and unprivileged, and not for mere omission of a relevant fact." (Janklow v. Newsweek, Inc. (8th Cir. 1985) 759 F.2d 644, 648; fn. omitted.) Of particular significance in the present case is the Janklow court's further conclusion that refusal to impose liability for omission of facts "has strong under-

pinnings in the First Amendment." (759 F.2d at p. 648.) Said the court: "In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), the Supreme Court struck down a state law that made punishable as a misdemeanor a newspaper's failure to print the reply of a political candidate to a column by that newspaper attacking the candidate's official record. . . . While newspapers have long been liable for that which they publish, they have never been liable solely for that which was omitted. [Citation.] We see no constitutionally significant distinction between the law struck down in Miami Herald, which made it a misdemeanor not to publish a specific item, and a cause of action that would permit a plaintiff to recover damages based on mere failure to publish a specific item." (Janklow v.

Newsweek, Inc., supra, 759 F.2d at p. 648.)

Plaintiff contends the trial court erred in ordering depositions for the purpose of ruling on the demurrer to the complaint and in taking judicial notice of the depositions in sustaining the demurrer (see De Cruz v. County of Los Angeles (Oct. 31, 1985. B009265) ____ Cal.App.3d _____). He also complains of the court's refusal to allow him to conduct discovery for that purpose beyond the limited scope ordered by the court. It is unnecessary to consider the merits of these contentions inasmuch as the action of the court in sustaining the demurrer was correct. "'. . . No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because

given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" (D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 19.)

We turn now to the amended complaint. Defendant argues no cause of action is stated under the unfair competition and false advertising laws (Bus. & Prof. Code, § 17200 et seq., § 17500 et seq.) because the remedy for violation of such laws does not include damages for private individuals, but is limited to injunctive relief (Id., §§ 17203, 17535) and imposition of civil penalties (Id., §§ 17206, 17207, 17535.5, 17536). In United Farm Workers of America v. Superior Court (1975) 47 Cal.App.3d 334, 343-345, it was held that damages are recoverable by an individual

plaintiff for violation of the unfair competition law. The court there reasoned: "[T]he breach of a duty imposed by statute gives rise to a cause of action for damages if damages can be shown. The fact that the statutes sound in equity and by their terms do not specify that damages may be awarded does not bar the recovery of damages in a proper case even though the action be one in equity rather than law." (United Farm Workers, supra, 47 Cal.App.3d at p. 344.) However, in Chern v. Bank of America (1976) 15 Cal.3d 866, the Supreme Court stated: "Plaintiff's cause of action to recover damages for false or misleading statements (Bus. & Prof. Code, § 17500) was likewise properly dismissed. The applicable statutes do not authorize recovery of damages by private individuals. Private relief is limited to filing of actions for an injunction (Id., § 17535);

and civil penalties are recoverable only by specificed public officers (Id., §§ 17535.5, 17536.)" (P. 875; original emphasis.)

Both parties rely on Committee on Children's Television, Inc. v. General Foods Corp., supra, 35 Cal.3d 197, in support of their respective positions on the issue whether a plaintiff other than a business competitor can recover damages on a cause of action based on the unfair competition or false advertising law. Such reliance is misplaced, for the Supreme Court in that case deemed it unnecessary to reach the issue and thus did not resolve the conflict between United Farm Workers and Chern; the court merely referred to both cases for a discussion of the damage issue. (35 Cal.3d at p. 215, fn. 16.) Inasmuch as Chern is a

decision of the Supreme Court, we are bound to follow it. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) We therefore conclude that the amended complaint does not state causes of action for damages sustained by plaintiff as a private individual based on defendant's alleged violation of the unfair competition and false advertising laws.

As previously noted, it appears that the cause of action labeled "breach of public duty and trust to report the news fairly and honestly without bias or prejudice" was included in the amended complaint in response to the trial court's comments in sustaining the demurrer to the complaint. That the First Amendment prohibits imposition of such a duty is made clear by the United States Supreme Court. "For better or worse, editing is

what editors are for; and editing is selection and choice of material. That editors -- newspaper or broadcast -- can and do abuse this power is beyond doubt. . . . Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility -- and civility -- on the part of those who exercise the guaranteed freedoms of expression." (Columbia Broadcasting v. Democratic Comm. (1973) 412 U.S. 94, 124-125 [36 L.Ed.3d 772, 796, 93 S.Ct. 2080].) The principle was stated even more forcefully in Miami Herald Publishing Co. v. Tornillo (1974) 418 U.S. 241, 258

[41 L.Ed.2d 730, 741, 94 S.Ct. 2831].):
"The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." (Emphasis added.)

The elements of a cause of action for intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge

by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption thereof; and (5) damages to plaintiff proximately caused by the act of the defendant. (Buckaloo v. Johnson (1975) 14 Cal.3d 815, 827; Smith v. Superior Court (1984) 151 Cal.App.3d 491, 501; Asia Investment Co. v. Borowski (1982) 133 Cal.App.3d 832, 840-841.) The amended complaint sets forth each of these elements. It alleges that plaintiff, as author of the novel "Legion" own valuable rights in the book and in revenues from its sale. Many persons purchase current novels, and many book sellers promote current novels, primarily because such novels are included in defendant's best seller list; many book stores discount books appearing in the

list and display such books more prominently than those not on the list. Thus, books included in the list sell substantially more copies than those not appearing therein. Defendant knew the list had and has such influence. Because of this influence, authors whose books appear on the list have a "significant and valuable prospective business advantage" in promoting and maximizing sales of their books. Defendant expressly and impliedly represented to authors, book sellers and the general public that the list was an objective, unbiased and accurate compilation of actual sales of books each week by 2,000 book stores in every region of the United States. At the time it made such representations defendant knew they were untrue. With knowledge that the list had substantial influence on book sellers

and the general public and that plaintiff would be deprived of the prospective advantage by omission of his book from the list, defendant "intentionally or recklessly and without cause" refused to include the book in the list. Defendant acted with the intent and purpose of depriving plaintiff of his rights and property. As a direct and proximate result of defendant's acts, plaintiff suffered damages.

Defendant argues that the foregoing allegations do not include the first and second elements of a cause of action for intentional interference with prospective economic advantage because there is no showing that plaintiff had an existing economic relationship with any specific third person. but only a showing of possible future relationship with potential purchasers of his book; the

allegation that defendant knew of the list's influence on such purchasers is not tantamount to an allegation that defendant knew of an existing relationship subject to intentional interference. The contention lacks merit. The tort of interference with prospective advantage lies for interference with relations which are merely prospective or potential. (See Buckaloo v. Johnson, supra, 14 Cal. 3d 815, 822; Gold v. Los Angeles Democratic League (1975) 49 Cal.App.3d 365, 375.) Liberally construed with a view to substantive justice between the parties (See Postley v. Harvey (1984) 153 Cal. App.3d 280, 287), the amended complaint alleges the requisite relationship and defendant's knowledge of the existence of that relationship.

Defendant also contends the cause of action for intentional interference

with prospective advantage is fatally defective because defendant owed plaintiff no duty to protect his economic interest. In support of this contention defendant cites Worldvision Enterprises, Inc. v. American Broadcasting Companies, Inc. (1983) 142 Cal. App.3d 589. That case is not in point inasmuch as it involved an action for negligent interference with prospective economic advantage.

Defendant further argues that inasmuch as the list was compiled in the exercise of its editorial judgment and represented its opinion of which books were best sellers, the First Amendment shields defendant from liability for interference with plaintiff's prospective advantage by refusing to include his book in the list. (See Miami Herald Publishing Co. v. Tornillo, supra, 481

U.S. 241, 258 [41 L.Ed.2d 730, 741, 94 S.Ct. 2831]; Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 339-340 [41 L.Ed. 2d 789, 805, 94 S.Ct. 2297].) This contention ignores the amended complaint's allegation that defendant falsely represented, with knowledge of falsity, that the list was an accurate and objective compilation of actual sales of books each week in 2,000 book stores throughout the United States. The list thus was not held out as the product of defendant's editorial jdgment or an expression of its opinion but was falsely represented to be in fact a compilation of best sellers based on objective criteria. Under these circumstances the First Amendment does not foreclose plaintiff's cause of action. "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error

materially advances society's interest in 'uninhibited, robust, wide-open' debate on public issues. [Citation.] They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' [Citation.]" (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 340 [41 L.Ed.2d at p. 805].)

We conclude that the judgment of dismissal must be reversed as to the causes of action for intentional interference with prospective economic advantage.

II

APPEAL FROM ORDER DENYING MOTION TO TAX COSTS

Inasmuch as the award of costs to

defendant was incident to the judgment, partial reversal of the judgment operates to vacate the award. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 625, p. 607.) Accordingly, plaintiff's appeal from order denying his motion to tax costs, is moot, and the appeal therefrom is dismissed.

DISPOSITION

The judgment of dismissal is reversed as to the first and second causes of actions which directions to the trial court to overrule the demurrer to those causes of action and allow defendant a reasonable time within which to file an answer thereto; in all other respects the judgment is affirmed. Plaintiff's appeal from order denying his motion to tax costs is dismissed. Neither party shall recover costs on appeal.

CERTIFIED FOR PUBLICATION.

LILLIE, P.J.

We concur:

THOMPSON, J.

JOHNSON, J.

C O P Y

Supreme Court
F I L E D
Dec. 29, 1986
Laurence P. Gill, Clerk

L.A. 32173
Ct. App. 2/7 B 008737
and B 010053

Super. Ct. No.
WEC 82071

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

WILLIAM PETER BLATTY,

Plaintiff and Appellant,

v.

NEW YORK TIMES COMPANY, et al.,

Defendants and Respondents.

The fundamental question in this case is whether a newspaper can be held liable for failing to include a book in its list

SEE CONCURRING AND DISSENTING OPINION

of "best sellers". As we shall explain, we conclude that the answer is no.

I

Plaintiff William Peter Blatty brought this action for damages against defendant New York Times Company, publisher of the New York Times. Four causes of action are asserted in the original complaint: negligent interference with prospective economic advantage, negligence, and trade libel.

The allegations underlying each of these causes of action may be summarized as follows: Blatty is the author of a number of works of fiction including The Exorcist and a recently published hardback novel entitled Legion; the Times publishes a weekly list "purporting to rank best selling books . . . based on actual sales"; because many new books are published each year, authors whose hardback books appear

on this list benefit by greater sales of the books themselves and an increased value of paperback and film rights; although the list purports to rank books on the basis of sales and expresses no opinion on thier merits, because of the reputation of the Times and its perceived expertise in literary matters the list has a substantial positive influence on the ordering and promotion of books by booksellers and on the purchase of books by consumers; the Times knew or should have known of this influence; Legion, authored by Blatty and published by Simon & Schuster, sold more than enough copies, and met all other criteria, to merit inclusion on the list; the Times, however, failed to include Legion; as a result, Blatty suffered injury by loss of the benefits that inclusion would have brought. With respect to the intentional-interference claim it is also

alleged that Simon & Schuster provided the Times with information to the effect that Legion had sold more than enough copies to merit inclusion, but that the Times nevertheless refused to include the book.

Although they bear different labels, the four causes of action each have as their gravamen the alleged injurious falsehood of a statement-viz., the Times falsely represented that the list was based on actual sales; by failing to include Legion, the Times falsely represented that the novel did not meet its stated criteria for inclusion; by these misrepresentations, the Times adversely affected the volume of sales of the hardback edition and consequently the value of the paperback and film rights, thereby subjecting Blatty to injury.

Before the Times responded to the

complaint, Blatty filed a notice to take certain depositions and produce certain documents. Thereupon the Times generally demurred on the following ground, among others: "The Complaint as a whole fails to state facts sufficient to constitute a cause of action against the Times in that . . . the complained of 'Best Seller' list is not of and concerning plaintiff and therefore cannot constitutionally provide a basis for liability upon a media defendant . . ." In its memorandum of points and authorities the Times properly requested that the court take compulsory judicial notice, pursuant to Evidence Code sectiosn 452 and 453, of a copy of one week's list which bore the following legend: "The listings above are based on computer-processed sales figures from about 2,000 bookstores in every region of

the United States."

Blatty moved to compel discovery, asserting his right to do so despite the pendency of the demurrer. In support he submitted a declaration incorporating by reference an attached newspaper article which he alleged showed the relevance of the proposed discovery. Led by the article to question the truth of Blatty's allegation that the Times refused to include Legion on the list despite its receipt of sales information from Simon & Schuster, the court declined to rule on the demurrer until it could determine whether the allegation was supported by admissible evidence. Over Blatty's objection, the court then issued an order directing the parties to depose certain employees of Simon & Schuster and the Times with regard to the alleged communication and to that matter alone, and the parties did so. Also over Blatty's

objection, the court prohibited further discovery until the legal sufficiency of his complaint appeared.

Taking judicial notice of what it considered to be the "uncontradicted facts adduced at the depositions" to the effect that "at no time did [Simon & Schuster] disclose to [the Times] the actual figures of sales of the book," the court made the following ruling, as subsequently clarified, on the demurrer. As to the intentional-interference claim, the court sustained the demurrer but granted leave to amend "to allege in good fiath facts to establish (1) that the New York Times violated its public duty or trust to sell or distribute its newspaper to the public containing a fair and honest report of all news without bias or prejudice; and (2) . . . that the New York Times had in its possession reports of the actual sales

of the book, Legion, which would qualify it for inclusion on the Best Seller List, and deliberately refrained from listing plaintiff's book." As to this cause of action the court ruled that "if the new facts to be alleged also are sufficient to support other causes of action, the complaint may so allege," and that Blatty was "limit[ed] . . . to a cause of action for an intentional omission of Legion from the 'Best Seller List' by the New York Times despite its knowledge that the sales of the book to the public qualified it for inclusion on the List." As to Blatty's other claims, the court sustained the demurrer "on all grounds stated therein without leave to amend."

In his amended complaint Blatty added Doe defendants and asserted five causes of action: intentional interference with prospective economic advantage based

on the Times publication of the list in the newspaper; intentional interference with prospective economic advantage based on the Times marketing of the list separate and apart from its newspapers publication; unfair competition in violation of Business and Professions Code sections 17200 to 17208; false and misleading advertising in violation of Business and Professions Code sections 17500 to 17520; and "breach of [the] public duty and trust to report the news fairly and honestly without bias or prejudice."

The allegations underlying each of these causes of action are essentially those stated in the original complaint with the following relevant modifications and additions: the Times falsely "represented . . . that the List was an objective, unbiased and accurate compilation of actual sales of books each week by

2000 bookstores in every region of the United States"; and Simon & Schuster told the Times that it had sales figures to substantiate its claim that Legion merited inclusion, but the Times failed and refused to review the figures.

Once again, although they bear different lables the five causes of action each have as their gravamen the alleged injurious falsehood of a statement--viz., the Times falsely represented that the list was an accurate compilation of actual book sales; by failing to include Legion, the Times falsely represented that the novel did not meet its stated criteria for inclusion; and by so doing the Times caused Blatty to be harmed.

The Times again generally demurred on the ground, among others, that the complaint was 'barred by the First Amendment to the United States Constitution

and by Article I, Section 2 of the California Constitution, in that those provisions . . . forbid the imposition of liability where, as here, no statement has been made 'of and concerning' the plaintiff. . . ." In its memorandum of points and authorities the Times again effectively made a proper request that the court take compulsory judicial notice of a copy of one week's list and the legend it bore.

The court sustained the demurrer without leave to amend "on grounds stated in the moving papers," ordered the action dimissed, awarded costs to the Times, and entered judgment accordingly. After judgment Blatty moved to tax costs, and the court denied the motion.

Thereupon Blatty filed timely notices of appeal from the judgment of dismissal and the order denying his motion to tax

costs. On his motion the Court of Appeal ordered the appeals consolidated.

On appeal, Blatty contended that both the original and the amended complaints stated causes of action, and that in the proceedings on the demurrer to the original complaint the court erred in ordering and taking judicial notice of the depositions and in restricting discovery to those limited depositions. He also contended that the court erred in denying his motion to tax costs.

Relying on our decision in Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 209, in which we held that "Although ordinarily an appellate court will not consider the allegations of a superseded complaint [citation], that rule does not apply when the trial court denied plaintiffs leave to amend to include those allegations in

an amended complaint," the Court of Appeal concluded that its review extended not only to the claims of the amended complaint but also to those of the original complaint as to which the trial court sustained the demurrer without leave to amend.

The Court of Appeal held that the facts alleged were legally sufficient to support the intentional interference causes of action of the amended complaint and accordingly reversed the judgment of dismissal in that respect with directions to overrule the demurrer as to those causes of action. It also held that the trial court otherwise properly ruled on the demurrers, and hense that it was not obligated to, and did not, reach Blatty's contentions concerning the discovery rulings; it therefore affirmed the judgment in all other respects. It also dismissed the appeal from the order

denying Blatty's motion to tax costs on the ground that because the award of costs to the Times was incident to the judgment, the partial reversal operated to vacate the award and hence this appeal was moot.

Both parties petitioned for review. In his petition Blatty contended that the trial court erred in ordering and taking judicial notice of the depositions for the purpose of ruling on the original complaint and that the Court of Appeal erred in holding that no cause of action was or could be stated for negligence, negligent interference with prospective economic advantage, or unfair competition. In its petition the Times contended that the Court of Appeal erred in holding that on the facts alleged it can be held liable under either or both of the amended complaint's two causes of action for intentional interference with prospective

economic advantage.

II

When, as in this case, the ultimate object of our review is the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. We accept as true "all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (Serrano v. Priest (1971) 5 Cal.3d 584, 591.) We also consider facts that may be judicially noticed. (Ibid.) Indeed, when the allegations of the complaint contradict or are inconsistent with such facts, we accept the latter and reject the former. (See, e.g. Curran v. Mount Diable Council of the Boy Scouts (1983) 147 Cal.App.3d 712, 722; Saltares v. Kristovich (1970) 6 Cal.App.3d 504, 510-511, and cases cited.) "When a demurrer is sustained, we detemined whether the complaint states facts sufficient to

constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

The Times contends that Blatty's intentional interference claims--and his other claims as well--do not, and cannot, state a claim on which relief may be granted. In support it argues, inter alia, that the First Amendment to the United States Constitution and article I, section 2, of the California Constitution establish an absolute bar to liability.

For the reasons that follow, we agree.

A

In order to advance society's interest in free and open discussion on matters of public concern and to avoid undue self-censorship by the press, the First Amendment establishes a broad zone of protection within which the press may publish without fear of incurring liability on the basis of injurious falsehood. (Reader's Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, 265; see Bose Corp. v. Consumers Union of U.S., Inc (1984) 466 U.S. 485, 513; see generally New York Times Co. v. Sullivan (1964) 376 U.S. 254, 267-283; Curtis Publishing Co. v. Butts (1967) 388 U.S. 130, 155 [plur. opn.], 162-165 [conc. opn. of Burger, C.J.], 170 [conc. opn. of Black, J.], 172 [conc. opn. of Brennan, J.]; Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 339-348.) Article I, section

2, of the California Constitution, our state constitution guarantee of freedom of expression and of the press, independently establishes a zone of protection that is broader still. (See People v. Glaze (1980) 27 Cal.3d 841, 844, fn. 2; Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899, 908-910, affd. (1980) 447 U.S. 74; Wilson v. Superior Court (1975) 13 Cal.3d 652, 658.)

The necessity for this protection is clear. "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty--and thus a good unto itself--but also is essential to the common quest for truth and the vitality of society as a whole." (Bose Corp. v. Consumers Union of U.S., Inc., supra, 466 U.S. at pp. 503-504.)

The First Amendment establishes its broad zone of protection by means of

various rules. Two are especially implicated by the allegations of the original and amended complaints herein.

At the threshold, in defamation actions--in which, of course, the alleged injurious falsehood of a statement is the gravamen of the plaintiff's claim--the amendment has abrogated the common law of strict liability. (Gertz v. Robert Welch, Inc., supra, 418 U.S. at p. 347.) For constitutional purposes it is not enough that the traditional affirmative defense of truth, with the burden of proof on the defendant, be available to the press; rather it is the plaintiff who is required to plead and prove falsehood. (Id. at pp. 339-348; New York Times Co. v. Sullivan, supra, 376 U.S. at pp. 278-280; see, e.g. Bose Corp. v. Consumers Union of U.S., Inc., supra, 466 U.S. at p. 511, fn. 30 [holding that when the plaintiff is a

public official or public figure, in order to carry his burden he must prove "actual malice"--i.e., he must "demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement"; Gertz v. Rober Welch, Inc., supra, at p. 347 [effectively holding that when the plaintiff is a private individual, he must prove that the defendant made the falsehood with at least negligence].)

In defamation actions the First Amendment also requires that the statement on which the claim is based must specifically refer to, or be "of and concerning," the plaintiff in some way. The New York Times case suggested as must, although it could possibly have been read to imply that the requiement derives from the due process clause of the Fourteenth Amendment and

ultimately from the state's definition of the tort of defamation, and hence that it is merely an element which the state is presumably free to require or not as it sees fit. (376 U.S. at pp. 288-292.) Rosenblatt v. Baer (1966) 383 U.S. 75, however, made it plain that the requirement derives directly and ultimately form the First Amendment. In that case, the United States Supreme Court held that a defamation plaintiff could not constitutionally establish liability without satisfying the requirement even though the governing state law imposed no such prerequisite: "under New York Times . . . [the plaintiff is] required to show specific reference." (Id. at p. 83, italics added.)

Although the limitations that define the First Amendment's zone of protection for the press were established in defamation

actions, they are not peculiar to such actions but apply to all claims whose gravament is the alleged injurious falsehood of a statement: "That constitutional protection does not depend on the label given the stated cause of action" (Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at p. 265), and no cause of action "can claim . . . talismanic immunity from constitutional limitations" (New York Times Co. v. Sullivan, sura, 376 U.S. at p. 269). (See, e.g. Bose Corp. v. Consumers Union of U.S., Inc., supra, 466 U.S. at pp. 493-514 [in a product-disparagement action a public figure plaintiff must prove actual malice]; Time, Inc. v. Hill (1967) 385 U.S. 374, 387-388 [under a statute granting a person a right of action when his name, picture or portrait is the subject of a false publication, a public-figure plaintiff must prove

actual malice]; Reader's Digest Assn. v. Superior Court, sura, at p. 265 [in an action for intentional infliction of emotional distress, "false light" invasion of privacy, and "intrusion" invasion of privacy, a public-figure plaintiff must prove actual malice]; Kapellas v. Kofman (1969) 1 Cal.3d 20, 35, fn. 16 [same as to "false light" invasion of privacy].)

Further, it is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property broadly defined. (See Bose Corp. v. Consumers U. of U.S., Inc. (D. Mass. 1981) 508 F.Supp. 1249, 1270-1271, revd. on other grounds (1st Cir. 1982) 692 F.2d 189, affd. (1984) 466 U.S. 485 [holding that when a public-figure plaintiff sues to recover damages predicated on injury to his product, just as when he sues to recover damages

predicated on injury to his reputation, he must prove actual malice]; Simmons Ford, Inc. v. Consumers Union of U.S., Inc. (S.D.N.Y. 1981) 516 F.Supp. 742, 744, fn. 4 [same].)

The fundamental reason that the various limitations rooted in the First Amendment are applicable to all injurious falsehood claims and not solely to those labeled "defamation" is plain: although such limitations happen to have arisen in defamation actions, they do not concern matters peculiar to such actions but broadly protect free-expression and free-press values. (See Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at p. 265.)

For example, the fault requirement give "freedom[] of expression . . . the 'breathing space' that [it] 'need[s] . . . to survive.'" (New York Times v. Sullivan,

surpa, 376 U.S. at pp. 271-272.) As the United States Supreme Court has stated: "Realistically, . . . some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in New York Times, Butts, Gertz, and similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material." (Herbert v. Lando (1979) 441 U.S. 153, 171-172; accord, Bose Corp. v. Consumers Union of U.S., Inc., supra, 466 U.S. at p. 513.)

The "of and concerning" or specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt.

To allow a plaintiff who is not identified, either expressly or by clear implication, to institute such an action poses an unjustifiable threat to society. For example, as a federal court has cautioned, the absence of the "of and concerning" requirement "could invite any number of vexatious lawsuits and seriously interfere with public discussion of issues, or groups, which are in the public eye. Statements about a religious, ethnic, or political group could invite thousands of lawsuits from disgruntled members of these groups claiming that the portrayal was inaccurate and thus libelous. Such suits would be especially damaging to the media, and could result in the public receiving less information about topics of general concern." (Michigan United Conservation Clubs v. CBS News (W.D.Mich. 1980) 485 F.Supp. 893, 900, affd. (6th

Cir. 1981) 665 F.2d 110.) In the special case in which the plaitniff is a public official suing in response to criticism of governmental operations, an absence of this requirement would allow recovery based on a theory that is "tantamount to . . . libel of government, and therefore . . . constitutionally insufficient." (Rosenblatt v. Baer, supra, 383 U.S. at p. 83.)

The "of and concerning" requirement serves to immunize a kind of statement which, though it can cause hurt to an individual, is deemed too important to the vigor and openness of public discourse in a free society to be discouraged. Statements of opinion, "[h]owever pernicious," are immunized by the First Amendment in order to insure that their "correction [depends] not on the conscience of judges and juries but on the competition of other ideas." (Gertz v.

Robert Welch, Inc., supra, 418 U.S. at p. 339.) Statements without specific reference are immunized for a similar reason: "'It is far better for the public welfare that some occasional consequential injury to an individual arising from general censure of his profession, his party, or his sect should go without remedy than that free discussion on the great questions of politics, or morals, or faith should be checked by the dread of embittered and boundless litigation.'" (Michigan United Conservation Clubs v. CBS Nes, supra, 485 F.Supp. at . 900.)1/

1/ To be referred to specifically, we emphasize, the plaintiff need not be mentioned by name, but may be identified by clear implication. For example, if a company consists of Smith, Jones, and Doe, and publication asserts "Smith and Jones are the only honest members of the company," certainly the publication specifically refers to Doe and accuses him of dishonesty by clear implication.

Not only does logic compel the conclusion that First Amendment limitations are applicable to all claims, of whatever label, whose gravamen is the alleged injurious falsehood of a statement, but so too does a very pragmatic concern. If these limitations applied only to actions denominated "defamation," they would furnish little if any protection to free-speech and free-press values: plaintiffs suing press defendants might simply affix a label other than "defamation" to their injurious-falsehood claims--a task that appears easy to accomplish as a general matter (see, e.g., Reader's Digest Assn. v. Superior Court, supra, 37 Cal.3d at p. 265 [injurious-falsehood claim asserted as causes of action for defamation, intentional infliction of emotional distress, "false light" invasion of privacy, and

"intrusion" invasion of privacy])--and thereby avoid the operation of the limitations and frustrate their underlying purpose.

Regrettably, the foregoing is not mere unsupported speculation. In recent years plaintiffs suing press defendants have more frequently affixed lables other than defamation to injurious falsehood claims and have increasingly achieved some measure of success in their actions. (Mead, Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution (1983) 23 Wash.L.J. 24, 24-25, 30-44 [discussing defamation, privacy, and intentional infliction of emotional distress theories].)

It follows that to prevent creative pleading from rendering the limitations nugatory, they must be broadly applicable whenever the gravamen of the claim is injurious falsehood.

B

The causes of action for intentional interference with prospective economic advantage, as stated, are barred by the First Amendment.

It is plain that Blatty's intentional interference claims have as their gravamen the alleged injurious falsehood of a statement. Under the allegations of the amended complaint the assertion they make is as follows: the Times falsely represented that the list was an accurate compilation of actual book sales, by failing to include Legion, the Times falsely represented that the novel did not meet its stated criteria for inclusion; by so doing the Times caused Blatty to be harmed. Under the allegations of the original complaint the assertion can be read in substantially the same way, and in his petition for review Blatty himself urged us to do so. Because these

causes of action thus have as their gravamen the alleged injurious falsehood of a statement, they must satisfy the requirement of the First Amendment.

It is also plain that Blatty's intentional interference claims fail to satisfy First Amendment requirements.

The claims fail to allege that the list is of and concerning, or specifically refers to, Blatty or his novel. In order to satisfy this requirement, the plaintiff must effectively plead that the statement at issue either expressly metions him or refers to him by reasonable implication. (Cf. Kelly v. Johnson Publishing Co. (1958) 160 Cal.App.2d 718, 721-726 [action for defamation and invasion of privacy]; Saucer v. Giroux (1921) 54 Cal.App. 732, 733-734 [action for defamation].) Blatty, however, can do neither.

To begin with, the list does not

expressly refer to Blatty or his novel. Nor does he contend otherwise. Quite the contrary: the failure of Legion to appear on the list is the very basis of his action.

Further, the list cannot be reasonably understood to refer to Blatty or his novel by implication. When, as in this case, the statement that is alleged to be injuriously false concerns a group--here, books currently in print and their authors--the plaintiff faces a "difficult and sometimes insurmountable task. If the group is small and its members easily ascertainable, [the] plaintiff[] may succeed. But where the group is large--in general, any group numbering over twenty-five members--the courts in California and other states have consistently held that plaintiffs cannot show that the statements were 'of and concerning them,' See, e.g., Noral v. Hearst Publications, Inc., 40 Cal.App.2d 348 350, 104 P.2d 860 (1940);

Mullins v. Brando, 13 Cal.App.3d 409, 422-23 & n. 13, 91 Cal.Rptr. 796 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2231, 29 L.Ed.2d 701 (1971), and cases cited therein; Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952)." (Barger v. Playboy Enterprises, Inc. (N.D. Cal. 1983) 564 F.Supp. 1151, 1153, affd. (9th Cir. 1984) 732 F.2d 163, cert. den. ____ U.S. ____ [105 S.Ct. 175] [discussing Cal. defamation law].)

The group in question here obviously numbers substantially more than 25 members: a visit to even the smallest bookstore establishes this fact. Moreover, Blatty himself has impliedly admitted the point. In the amended complaint he alleges that "To obtain sales figures from bookstores, [the Times] sent to the bookstores forms . . . which [it] prepared; the forms for works of fiction contain and contained a printed list of 36 'bestselling' books

which has and had the effect of encouraging reports as to sales of books listed on the forms and discouraging reports as to sales of books not listed on the forms. . . . " By so stating Blatty impliedly alleges that the "forms" should have contained the titles of more than 36 books and hence books were potentially among the tope 15 "best sellers".2/

2/ Blatty's claims also fail to effectively allege falsehood. Contrary to Blatty's allegation, the Times did not make the crucial false representation of which he complains--viz., that the list was an accurate compilation of actual book sales. This is so because the Times never made such a representation, whether true or false. The legend of the list--of which the trial court properly took compulsory judicial notice (Evid. Code, §§452, subd. (h), and 453), and of which we must therefore take judicial notice as well (id., §459, subd. (a))--declared merely that "The listings above are based on computer-processed sales figures from about 2,000 bookstores in every region of the United States." To the extent that Blatty may mean to argue that the compound adjective "computer-processed" implies, in the words of the amended complaint, an "objective,

(fn. cont.)

Not only are the intentional interference claims barred by the First Amendment as stated, Blatty has failed to attempt to carry his burden of showing that it is reasonably possible he can cure the defect by amendment. Limiting our consideration to the "of and concerning" requirement, we reiterate that in sustaining the demurrer to the amended complaint without leave to amend the trial court relied generally "on ground stated in the moving papers"--one of which was that the complaint was barred by the constitutional provisions forbidding the imposition of liability "where, as here, no statement has been made 'of and concerning' the plaintiff. . . . " Even though he was

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(fn. 2 cont.)

unbiased and accurate compilation of actual sales," he is unpersuasive: the legend plainly implies that the list represents a general ranking of books based on sales figures from a sample of bookstores.

thus put on notice, Blatty has made no attempt to carry his burden. Hence, we are compelled to conclude that there is no reasonable possibility he can cure the defect.

To prevent this conclusion Blatty insists that the "of and concerning" requirement does not derive from the First Amendment. The point, as we have shown, is plainly without merit.

Blatty then argues in effect that to require a plaintiff to establish that the alleged injurious falsehood published by a press defendant is "of and concerning" him would add a new element to the tort of intentional interference with prospective economic advantage and thereby alter its nature, and that such a result is impermissible. In support he relies on Falwell v. Flynt (4th Cir. 1986) 797 F.2d 1270, in which the court held that a public-figure

plaintiff suing a press defendant for intentional infliction of emotional distress was not required to establish actual malice as that term has commonly been understood: "When applied to a defamation action, the actual malice standard alters none of the elements of the tort; it merely increases the level of fault the plaintiff must prove in order to recover in an action based upon a publication. Requiring a plaintiff to prove knowledge of falsity or reckless disregard of the truth in an action for intentional infliction of emotional distress would add a new element to this tort, and alter its nature." (Id. at p. 1275.) The point must be rejected.

The fundamental premise of Blatty's argument is unsound. Under the supremacy clause of state's definition of a tort cannot undermine the requirements of the First Amendment. That is precisely the

teaching of New York Times. In that case, the United States Supreme Court held that the First Amendment required the plaintiff to establish falsity (376 U.S. at pp. 279-280)--even though state law did not require him to do so (id. at p. 262). Indeed, in that case the court effectively held that the First Amendment abrogated the common law of strict liability, added the element of falsity, and thereby altered the nature of the tort. The Falwell court misses this crucial point and as a result cannot be followed.3/

3/ Blatty argues in effect that the First Amendment is inapplicable to the intentional-interference claim based on the Times's marketing of the list, on the ground that in that context the list constitutes "commercial speech." The argument is unpersuasive. To begin with, even in that context the list does not constitute commercial speech. "Commercial speech" is defined as speech that does "no more than propose a commercial transaction. . .·." (Pittsburg Press Co. v. Human Rel.

(fn. cont.)

Because each of the other causes of action that Blatty attempted to assert in

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(fn. 3 cont.)

Comm'n (1973) 413 U.S. 376, 385; see Friedman v. Rogers (1979 440 U.S. 1. 10. fn. 9: see generally Spiritual Psychic Science Church v. City of Azusa (1985) 39 Cal.3d 501, 510-511.) The list plainly does not come within that definition. That the Times is alleged to have marketed the list for its newspaper profit does not affect the result: commercial motivation does not transform noncommercial speech into commerical speech (see Friedman v. Rogers, supra, at p. 11, fn. 10; see also Va. Pharmacy Bd. v. Va Consumer Council (1976) 425 U.S. 748, 761 [stating that "Speech . . . is protected [under the' First Amendment] even though it is carried in a form that is 'sold' for profit"]; New York Times Co. v. Sullivan, supra, 376 U.S. at p. 266 [holding that the fact that the Times was paid for publishing the noncommercial advertisement in question in that case was "immaterial"]).

In any event, Blatty's major premise is false: commercial speech is not excluded from First Amendment protections. (E.g., Bose Corp. v. Consumers Union of U.S., Inc., supra, 466 U.S. at p. 504. fn. 22: Schaumburg v. Citizens for Better Environ. (1980) 444 U.s. 620, 632, fn. 7; Va. Pharmacy Bd. v. Va. Consumer Council, supra, 425 U.S. at pp. 758, 770.)

his original and amended complaints has as its gravamen the alleged injurious falsehood of the list and hence must satisfy First Amendment requirements, and because none of them does or can reasonably allege that the list is "of and concerning" Blatty or his novel, the Court of Appeal did not err in holding that the judgment of dismissal was proper as to them. Thus, we need not discuss Blatty's argument to the contrary. Nor need we consider his contentions going to the trial court's discovery rulings and its taking of judicial notice of the depositions in passing of the Times demurrer to the original complaint. Since each of the causes of action, as we have concluded, was barred on First Amendment grounds specified in the demurrer, the sustaining of the demurrer was correct and as such must be upheld. (Penziner v. West American Finance Co. (1933) 133 Cal.App. 578, 582;

Des Granges v. Crall (1915) 27 Cal.App. 313, 316; see e.g. Weinstock v. Eissler (1964) 224 Cal.App.2d 212, 224-226.) It follows that Blatty's point is uncessary to our decision and need not be considered. (E.g., Ferguson v. Keays (1971) 4 Cal.3d 649, 656, fn. 6; Young v. Three for One Oil Royalties (1934) 1 Cal.2d 639, 647.)4/

The judgment of the Court of Appeal is reversed in so far as it reverses the judgment of dismissal on the amended complaint's causes of action for intentional interference with prospective economic advantage, with directions to affirm the judgmeent in that respect,

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4/ Throughout this opinion we have used "First Amendment" to refer not only to that provisions of the United States Constituion, but also to article I, section 2, of the California Constitution. It is the later on which we preimarily rely.

and in all other respects the judgment of the Court of Appeal is affirmed; and the order of the Court of Appeal dismissing as moot the appeal from the order denying the motion to tax costs is reversed with directions to resolve that issue on the merits.

Mosk, J.

WE CONCUR:

Bird, C.J.
Reynoso, J.
Panelli, J.

C O P Y

BLATTY v. NEW YORK TIMES COMPANY

L.A. 32173

CONCURRING AND DISSENTING OPINION

BY GRODIN, J.

I cannot join in the majority's conclusion that the "of and concerning" requirement applicable to defamation actions is a constitutionally-required element of a cause of action for intentional interference with prospective economic advantage, whenever the alleged intentional tort is effectuated through a media publication. A hypothetical example may be helpful in exposing

the fallacy of the majority's broad holding.

Suppose that the New York Times, after conducting its normal survey of representative bookstores throughout the country, found that Blatty's novel was, indeed, the top selling book for a particular week based on its own statistics. Suppose further that, despite this information, the Times purposefully substituted one of its own publications for Blatty's book at the top of its best seller list in order to enhance its own book's sales, and entirely omitted Blatty's book from the list.

Under the majority's analysis, Blatty would have no cause of action against the New York Times for intentional interference with prospective economic advantage under these hypothetical facts,

because nothing in the false best seller list would have indicated to the reading public that the falsity in the published information was "of and concerning" Blatty's book. It seems clear from this hypothetical, however, that the "of and concerning" requirement is ill-suited to this type of intentional tort, since the plaintiff is required in any event to prove, as an element of the tort, that the defendant acted for the specific purpose of injuring the particular plaintiff. If a plaintiff can prove that a media defendant knowingly published a false statement for the purpose of inflicting financial injury on him persoanlly, I do not believe that the free speech provisions of either the state or federal Constitution would be offended if the defendant were held liable in damages for such conduct, even if it

were not obvious on the face of the publication who the defendant was intending to injure. Thus, I do not join in the majority's broad holding.

Nonetheless, on the specific facts of this case, I concur in the judgment. Although, plaintiff has attempted to state a cause of action for intentional interference with prospective economic advantage, the facts that he had alleged -- even after being granted leave to amend -- are not, in my view sufficient to support such an action. Plaintiff's allegations do not suggest that the Times intentionally misrepresented the actual results of its bookstore survey for the purpose of injuring plaintiff financially; at most, the allegations suggest that the Times did not do as thorough a job in gathering sales statistics as it should have and that,

after Blatty's publisher complained to the Times, the Times should have realized that its survey figures would harm plaintiff financially. Even assuming those allegations are true, they would not support recovery on an intentional interference theory.

Accordingly, I agree with the majority that the trial court properly sustained defendants' demurrer to all causes of action, and I concur in the reversal of the judgment of the Court of Appeal to the extent that its judgment is inconsistent with this conclusion.

GRODIN, J.

WE CONCUR:

BROUSSARD, J.
LUCAS, J.

Supreme Court
F I L E D
Feb. 26, 1987
Laurence P. Gill, Clerk

ORDER DUE
February 27, 1987

ORDER DENYING REHEARING

LA No. 32173

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

BLATTY,

Appellant

v.

NEW YORK TIMES CO.,

Respondent

Appellant's petition for rehearing DENIED.

The request for an order directing partial publication of the Court of Appeal opinion in the above-entitled cause is DENIED.

"Lucas"
Chief Justice

Supreme Court, U.S.
FILED
JUN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1803

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM PETER BLATTY,
Petitioner,

vs.

NEW YORK TIMES COMPANY
and Does 1 through 10, inclusive,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Did the California Supreme Court indicate clearly and expressly that its decision rested on bona fide separate, adequate and independent grounds when:

a. the majority based its opinion on both the first amendment and the California Constitution's free speech clause and stated that "[i]t is the latter on which we primarily rely";

b. California Supreme Court and appellate opinions, including the opinion below, establish without dissent that the California Constitution's free speech clause is more definitive and inclusive than the first amendment;

c. the majority cited ten different California decisions as authority for its constitutional holding; and

d. the remaining three justices, who concurred in the dismissal of plaintiff's claim, concluded that plaintiff had not satisfied the state's tort pleading requirements?

RULE 28.1 LIST

The New York Times Company's affiliates and nonwholly owned subsidiaries are:

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No. 86-1803

IN THE

Supreme Court of the United States

October Term 1986

WILLIAM PETER BLATTY,
Petitioner,

vs.

NEW YORK TIMES COMPANY
and Does 1 through 10, inclusive,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent The New York Times Company ("The Times") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the California Supreme Court's opinion in this case. That opinion is reported at 42 Cal. 3d 1033, 728 P.2d 1177, 232 Cal. Rptr. 542 (1986).

JURISDICTION

This Court lacks jurisdiction to review this case. Petitioner's claimed jurisdictional basis, 28 United States Code Section 1257(3), does not provide jurisdiction because the decisions of *all seven members* of the California Supreme Court adverse to petitioner below "clearly and

expressly" showed that the dismissal of plaintiffs' claims was "based on bona fide separate, adequate and independent [state] grounds." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

CONSTITUTIONAL PROVISIONS INVOLVED

The first amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press.

Article I, section 2 of the California Constitution provides in pertinent part:

> (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

STATEMENT OF THE CASE

This case presents the unusual question whether author William Peter Blatty may sue The Times under the California law of intentional interference with prospective business advantage[1] for failing to include his book, *Legion*,

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[1] Plaintiff also alleged causes of action for unfair competition (First Amended Complaint ("complaint") ¶¶ 23-27; App. 15-18); false and misleading advertising in violation of California Business and Professions Code §§ 17500-17572 (Complaint ¶¶ 28-33; App. 18-21); breach of the public duty and trust to report the news fairly and honestly without bias or prejudice (Complaint ¶¶ 34-39; App. 21-23); negligent interference with prospective advantage (Original Complaint ¶¶ 1-9; C.T. 1-4); negligence (Original Complaint ¶¶ 16-18; C.T. 5); and trade libel (Original Complaint ¶¶ 19-24; C.T. 6-7). The Times' demurrer, described in the text, *infra*, extended to these other claims as well. (C.T. 565-637).

on its weekly list of "best sellers" in the way Mr. Blatty wanted. Mr. Blatty filed his action because the book did not appear on the list as early as he thought it should, for as long as he thought it should, or in as high a position as he thought it should. All seven members of the California Supreme Court held that he could not maintain the lawsuit.

Three members of the court concluded that Mr. Blatty's complaint did not satisfy pleading requirements for the tort because his "allegations do not suggest that The Times intentionally misrepresented the actual results of its book store survey for the purpose of injuring Plaintiff financially." (App. 108-09) (Grodin, J., Broussard, J. and Lucas, J., concurring and dissenting). The majority of four held that Mr. Blatty could not sue The Times because the complaint centered upon an allegation of injurious falsehood, and the first amendment to the United States Constitution and the more speech-protective free speech provision in article I, section 2 of the California Constitution prevented the imposition of liability where a defendant had not made a statement "of and concerning" the plaintiff.[2] *The court stated explicitly that it was "primarily rely[ing]" on the California Constitution.* (App.

The trial court sustained the Times' demurrer as to all causes of action without leave to amend (C.T. 517-521, 689), and the California Court of Appeal and the California Supreme Court both unanimously affirmed the dismissal of all of these purported tort claims. They are not the subject of Mr. Blatty's petition. (App. 38-52).

[2] The Times submits that that conclusion is correct and is compelled by both federal and state constitutional precedent. The Times does not argue the merits of the majority's constitutional holding here, however, because the existence of a separate state ground for the decision precludes this Court's review. The Times addressed the merits of the holding in its Respondent's Brief in the California Court of Appeal and its Petition for Hearing in the California Supreme Court.

103 n.4) (Mosk, J., with Bird, J., Reynoso, J. and Panelli, J. concurring).

Mr. Blatty based his complaint principally upon claimed misrepresentations. He alleged that the legend that accompanies The Times' weekly list "expressly and impliedly . . . represented that the list was an objective, unbiased and accurate compilation of actual sales of books each week by 2000 book stores in every region of the United States." (Complaint ¶ 8; App. 6). The California Supreme Court and the trial court, however, took judicial notice of the legend, which actually stated: "The listings above are based on computer-processed sales figures from about 2,000 book stores in every region of the United States." (App. 66-67) (quoting legend).

Mr. Blatty further alleged that The Times knew the list was not an objective, unbiased or accurate reporting of actual sales because: (1) it used an undisclosed method of "weighting" book store sales; (2) it used prepared forms which contained a printed list of thirty-six "best selling" books when obtaining sales figures from book stores; (3) it mailed out four weeks of forms at a time so that the printed list on the forms was changed only monthly instead of weekly; (4) along with the forms, it mailed printed matter promoting certain books listed on the forms; and (5) it made no effort to investigate, check or review the sales figures that the book stores supplied. (Complaint ¶ 10; App. 7-9).

The intentional interference claim also was founded on an allegation that Legion "warrant[ed] inclusion on the List for many weeks during the summer of 1983" (Complaint ¶ 11; App. 9), and that plaintiff's publisher "contacted management employees of Defendants and provided information that Legion 'had sold more than sufficient copies to warrant inclusion on the List.' " (Complaint ¶ 13; App. 10). Mr. Blatty further alleged that The Times "intentionally or recklessly and without cause" excluded

"Legion" from the List except for one week in September, 1983, when it appeared in last place. (Complaint ¶ 15; App. 11-12).[3]

Mr. Blatty did not make the *one* allegation, however, that was crucial to a claim for interference with prospective business advantage under California law: that The Times' computer processed—sales figures, produced according to The Times' weighting system, listed his book among the top sellers but that The Times deliberately kept his book off the list for the purpose of injuring him. Indeed, Mr. Blatty did not allege at all that The Times altered its computer-processed list to remove his book. (App. 1-24). Nor did Mr. Blatty contend that The Times failed to survey 2,000 bookstores, or that the list was not computer based. (App. 1-24).

The Times demurred to the complaint. The Superior Court sustained the demurrer and entered a judgment of dismissal. (C.T. 690).

Plaintiff appealed. (C.T. 691). The California Court of Appeal, Second Appellate District, reinstated causes of

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[3] The complaint purported to set forth separate claims based upon: (1) The Times' weekly publication of its list in the Sunday Times (Complaint ¶¶ 5, 17-19; App. 4, 12-13); and (2) The Times' weekly publication of the List to book stores and other vendors (Complaint ¶ 21; App. 14), on the asserted ground that the latter was commercial speech less deserving of constitutional protection. The California Supreme Court rejected that attempted dichotomy. (App. 100-101 n.3).

The Court noted that the list was not commercial speech, as it was not "speech that does 'no more than propose a commercial transaction.' " (App. 100-101 n.3) (quoting *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 385 (1973)). It further stated that The Times' commercial motivation in disseminating the list "does not transform noncommercial speech into commercial speech." (App. 100-101 n.3). The concurring and dissenting opinion did not take issue with these holdings.

action for intentional interference with prospective business advantage. The court held that because plaintiff had alleged that his book was intentionally omitted from The Times' list, he had stated a cause of action for that tort. The Court of Appeal failed altogether to apply to the interference claims constitutional free speech protections under the California Constitution and the United States Constitution, which its own opinion acknowledged barred all other claims. (App. 38-39).

Both The Times and Mr. Blatty petitioned the California Supreme Court for a hearing, with The Times challenging the Court of Appeal's reinstatement of the intentional interference claims and Mr. Blatty challenging the Court of Appeal's affirmance of the dismissal of his other tort claims. *See* n.2, *supra.*

In two separate opinions, all seven members of the California Supreme Court agreed that Mr. Blatty could not sue The Times for failing to include Legion in its "best sellers" list. Justices Grodin, Broussard and Lucas found plaintiff's complaint deficient as a matter of state tort law because it did not satisfy the elements of a cause of action for intentional interference with prospective business advantage. (App. 108). These three justices concluded:

> Plaintiff's allegations do not suggest that the Times intentionally misrepresented the actual results of its book store survey for the purpose of injuring plaintiff financially; at most, the allegations suggest the Times did not do as thorough a job in gathering sales statistics as it should have and that, after Blatty's publisher complained to the Times, the Times should have realized that it's survey figures would harm Plaintiff financially.

(App. 108-109) (Grodin, J., Broussard, J. and Lucas, J., concurring in the result but dissenting from a portion of the majority's constitutional holding).

The majority of the Court, in an opinion by Justice Mosk, did not address these deficiencies of Mr. Blatty's complaint. The majority concluded, instead, that the complaint was constitutionally deficient under article I, section 2 of the California Constitution because Mr. Blatty could not allege an essential element of a claim for an alleged injurious falsehood under the California Constitution: that the falsehood occurred in a statement "of and concerning" him. (App. 93) (citing *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 721-26, 325 P. 2d. 659 (1958); *Saucer v. Giroux*, 54 Cal. App. 732, 733-34, 202 P. 887 (1921)).

The majority opinion rested both on federal first amendment and on state free speech grounds. The majority "clearly and expressly" stated a "bona fide separate, adequate and independent" state constitutional ground, on which it "primarily rel[ied]" for its decision (App. 103 n.4), entirely apart from any first amendment considerations.

At the outset of its analysis, the majority acknowledged its agreement with the The Times' arguments that the first amendment and article I, section 2 of the California Constitution establish an absolute bar to liability. The majority referred to the first amendment's "zone of protection within which the press may publish without fear of incurring liability on the basis of injurious falsehood." (App. 78) (citing *Reader's Digest Assoc. v. Superior Court*, 37 Cal. 3d 244, 265, 690 P. 2d 610, 208 Cal. Rptr. 137 (1984); and four decisions of this Court).[4]

The majority then immediately cited the broader protections of the California Constitution, stating:

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[4] Those decisions are: *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 513, *reh. den.*, 467 U.S. 1267 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 267-83 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 162-165, 170, 172 (1967); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-48 (1974).

> Article I, section 2, of the California Constitution, our state constitutional guarantee of freedom of expression and of the press, independently establishes a zone of protection that is broader still. (*See People v. Glaze*, (1980) 27 Cal. 3d 841, 844, n.2; *Robins v. Pruneyard Shopping*, (1979) 23 Cal. 3d 899, 908-910, aff'd. (1980) 447 U.S. 74; *Wilson v. Superior Court* (1975) 13 Cal. 3d 652, 658.)

(App. 78-79).

The majority opinion noted that it used the term "First Amendment" to "refer not only to that provision of the United States Constitution, but also to Article I, section 2, of the California Constitution." (App. 103 n.4). The court then stated: "It is the latter on which we primarily rely." (*Id.*).

Because of that state constitutional and case law reliance, the majority opinion was strewn with references to decisions of the California Supreme Court. The Court quoted from or cited ten separate California decisions in its analysis of the constitutional free speech issue, alone.

After citing the references quoted above, the Court again quoted its decision in *Reader's Digest Assoc. v. Superior Court*, 37 Cal. 3d at 265, this time for the propositions that "constitutional protection does not depend on the label given the stated cause of action" (App. 83), and that a public figure plaintiff must prove actual malice in an action for intentional infliction of emotional distress,[5] "false light"

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[5] To this extent, *Reader's Digest Association* is at odds with the decision of the Fourth Circuit Court of Appeals in *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir.), *reh. den.*, 805 F.2d 484 (4th Cir.), *cert. granted*, 107 S. Ct. 1601 (1987) (presenting the question whether "First Amendment defenses applicable to libel [are] also applicable to claims of intentional infliction of emotional distress when such claims are based

invasion of privacy and "intrusion" invasion of privacy (App. 84). The majority also cited *Kapellas v. Kaufman*, 1 Cal. 3d 20, 35 n.16, 459 P. 2d 912, 81 Cal. Rptr. 360 (1969) for the latter proposition regarding invasion of privacy.

The Court then discussed without citation the importance of the "of and concerning" requirement in injurious falsehood cases, reasoning that the requirement "serves to immunize a kind of statement which, though it can cause hurt to an individual, is deemed too important to the vigor and openness of public discourse in a free society to be discouraged." (App. 88).

The Court then applied the "of and concerning" requirement to Mr. Blatty's complaint and stated, again in reliance on California decisions:

> In order to satisfy this requirement, the Plaintiff must effectively plead that the statement at issue either expressly mentions him or refers to him by reasonable implication. (*Cf. Kelly v. Johnson Publishing Co.* (1958) 160 Cal. App. 2d 718, 721-726 [action for defamation and invasion of privacy]; *Saucer v. Giroux*, (1921) 54 Cal. App. 732, 733-734 [action for defamation]).

(App. 93).

The Court noted that the List does not expressly refer to Mr. Blatty at all. (App. 93-94). Finally, once again in reliance on California law, the Court concluded that the list

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upon alleged injurious falsehoods," (55 U.S.L.W. 3649-50 (March 24, 1987)). But *Readers Digest Association* is not here before this Court. The holding below does not conflict with *Falwell*, as both the tort and the first amendment defense involved in this petition are different from those in *Falwell* — there emotional distress and actual malice, here interference with prospective economic advantage and "of and concerning." The disagreement with the *Falwell* decision thus is merely dicta. (*See* App. 98-100.)

"cannot be reasonably understood to refer to Blatty or his novel by implication," because the group of excluded authors is too large. (App. 94). The Court stated:

> 'But where the group is large—in general, any group numbering over 20-25 members—*the Courts in California* and other states have consistently held that plaintiffs cannot show that the statements were "of and concerning them," *see, e.g., Noral v. Hearst Publications, Inc.*, 40 Cal. App. 2d 348, 350, 104 P.2d 860 (1940); *Mullins v. Brando*, 13 Cal. App. 3d 409, 422-23 & n.13, 91 Cal. Rptr. 796 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2231, 29 L.Ed.2d 701 (1971) and cases cited therein; *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952).'

(App. 94-95) (emphasis supplied) (quoting *Barger v. Playboy Enterprises, Inc.*, 564 F. Supp. 1151, 1153 (N.D. Cal. 1983), (discussing Cal. defamation law)), *aff'd.*, 732 F.2d 163 (9th Cir.), *cert. den.*, 469 U.S. 853 (1984).

The Court then stated that the group of excluded authors here obviously numbers substantially more than twenty-five members, which Mr. Blatty does not dispute (App. 95), and it finally concluded that Mr. Blatty could not cure the defect by amendment. (*Id.*).

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE DECISIONS OF ALL SEVEN JUSTICES OF THE CALIFORNIA SUPREME COURT INDICATE CLEARLY AND EXPRESSLY THAT THEY ARE BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

This Court lacks jurisdiction to decide this case because adequate and independent state grounds preclude the existence of a justiciable federal question. The Court clarified and refined its approach to the assessment of adequate and independent state grounds in *Michigan v. Long*, 463 U.S. 1032 (1983), noting that it would decline to review state court decisions that clearly articulate their state law basis. The Court held: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." 463 U.S at 1041.

As the Statement of the Case reveals and a review of the opinion of the California Supreme Court will confirm, both the majority opinion below and the concurring and dissenting opinion based their affirmance of the dismissal of Mr. Blatty's claims upon state grounds. Concurring in the judgment of dismissal, Justice Grodin relied entirely upon Mr. Blatty's failure to allege intentional acts designed to disrupt Mr. Blatty's prospective economic relationship with his book buyers. This is one of the requisite elements for a tort claim for interference with prospective business

advantage. *Buckaloo v. Johnson*, 14 Cal. 3d 815, 827, 537 P. 2d 865, 122 Cal. Rptr. 745 (1975).

Mr. Blatty does not really take issue with the state law basis for the three justices' concurrence in the dismissal of his claim. He does strain, however, to eliminate the California constitutional underpinning of the majority's conclusion in support of dismissal. Anticipating this Court's recognition of its lack of jurisdiction because of the majority's reliance upon the California Constitution, Mr. Blatty characterizes the majority's definitional footnote as a "formalistic disclaimer."

There is nothing formalistic about the footnote. To the contrary, the footnote relates to the substance of the majority's opinion, as it defines for purposes of the entire opinion its use of the term "First Amendment" and explains that the term refers both to the federal and to the California Constitution. (App. 103 n.4). The majority then states that the opinion *primarily* relies upon the California Constitution, (*id.*), which, it elsewhere advises, "independently establishes a zone of protection that is broader still [than the First Amendment to the United States constitution]." (App. at 79) (citing *People v. Glaze*, 27 Cal. 3d 841, 844 n.2, 614 P. 2d 291, 166 Cal. Rptr. 859 (1980); *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 908-910, 592 P. 2d 341, 153 Cal. Rptr. 854 (1979), *aff'd.* 447 U.S. 74 (1980); *Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 532 P. 2d 116, 119 Cal. Rptr. 468 (1975)).

Mr. Blatty suggests that the existence of adequate and independent state grounds should not be ascertained "by what [the state court] *says* it did." Petition at 41 (emphasis in original). That suggestion ignores the holding of this Court in *Long*, quoted above, which precludes review whenever the state court "clearly and expressly" states its reliance on separate, adequate and independent grounds. *Long*, 463 U.S. at 1041.

Here, the California Supreme Court expressly stated its reliance upon the more inclusive free speech protections of the California Constitution; it explicitly referred to the broader nature of those protections; and it cited ten different California decisions as authority for its primary constitutional holding.[6] A more "plain statement" (*Long*, 463 U.S. at 1042) that a decision rests upon separate state grounds cannot be imagined, short of a recitation that a state court was ignoring federal constitutional requirements altogether.

The *Long* test permits review only "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Long*, 463 U.S. at 1042.[7] The decision below is

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[6] The concurring and dissenting justices also recognized that the majority was relying separately upon the federal and state constitutions. Justice Grodin's opinion stated:

> If a plaintiff can prove that a media defendant knowingly published a false statement for the purpose of inflicting financial injury on him personally, I do not believe that the free speech provisions of *either the state or federal Constitution* would be offended if the defendant were held liable . . . .

(App. 107) (emphasis supplied).

[7] Those standards have been satisfied in each of the cases since *Long*—all quite unlike this one—in which this court has upheld its own jurisdiction. *See, e.g., Maryland v. Garrison*, 107 S. Ct. 1013, 1016-17 (1987) (Maryland opinion relies on the fourth amendment to the federal constitution in federal cases as well as the Maryland Declaration of Rights, but "the opinion indicates that the Maryland constitutional provision is construed in *pari materia* with the Fourth Amendment."); *New York v. P.J. Video, Inc.*, 106 S. Ct. 1610, 1613-14 n.4 (1986) (New York Court of Appeals cited New York Constitution "only once, near the beginning of its opinion, and in the same parenthetical also cited the Fourth Amendment to the United States Constitution"; and "the only citations appended to the crucial language quoted in the text were to . . .

quite unlike the decisions that fall within that description, such as the decision of the Ohio Supreme Court at issue in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), upon which petitioner relies heavily. In *Zacchini*, the Ohio Supreme Court syllabus and opinion did not mention the Ohio Constitution at all. The rationale for the state court decision appeared to have a purely federal basis. *Id.* at 568. The same is true of the rest of this Court's decisions in cases post-dating *Long* where no adequate and independent state ground was found. *See* cases cited in footnote 7, *supra.*

Because of the separate and independent state grounds for the decision below, review by this Court would lead to nothing more than an advisory opinion. This Court has noted the impermissibility of such an exercise:

> [O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would

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federal decisions"); *New York v. Class*, 106 S. Ct. 960, 963-64 (1986) (New York Court of Appeals mentions New York State Constitution "but once, and then only in direct conjunction with the United States Constitution"; and opinion generally cites both federal and New York cases for the same proposition); *Michigan v. Long*, 463 U.S. at 1043 ("Apart from its two citations to the State Constitution, the court below relied *exclusively* on its understanding of *Terry* [*v. Ohio*, 392 U.S. 1 (1968)] and other federal cases. Not a single state case was cited to support the state court's holding . . . .") (emphasis in original); *see also Montana v. Hall*, 107 S. Ct. 1825, 1827 (1987); *International Longshoremen's Association v. Davis*, 106 S. Ct. 1904, 1910-11 (1986); *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1435 n.3 (1986); *Caldwell v. Mississippi*, 105 S. Ct. 2633, 2639 (1985); *California v. Carney*, 105 S. Ct. 2066, 2068 n.1 (1985); *Ohio v. Johnson*, 467 U.S. 493, 497 n.7, *reh. den.*, 468 U.S. 1224 (1984); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 151-152 (1984); *Oliver v. United States*, 466 U.S. 170, 175 n.5 (1984); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361-362 (1984).

> be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945), *quoted in Zacchini*, 433 U.S. at 566; *see City of Long Beach v. Bozek*, 33 Cal. 3d 727, 728, 661 P. 2d 1072, 190 Cal. Rptr. 918 (1983); (holding on remand from this Court for clarification, that decision was based on the California Constitution); *see also Environmental Planning & Information Council v. Superior Court*, 36 Cal. 3d 188, 680 P. 2d 1086, 203 Cal. Rptr. 127 (1984) (reserving a right to decide whether the California Constitution may not permit distinctions between political and economic boycotts, even though this Court did permit the distinctions in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)).

II

THE CALIFORNIA CONSTITUTION'S FREE SPEECH PROVISION IS MORE DEFINITIVE AND INCLUSIVE THAN THE FIRST AMENDMENT.

California free speech decisions consistently have recognized that the California Constitution, and the California Supreme Court and appellate decisions construing it, afford greater protection to free expression than does the United States Constitution. *See San Jose Mercury-News v. Municipal Court*, 30 Cal. 3d 498, 508, 638 P. 2d 655, 179 Cal. Rptr. 772 (1982) ("We have recognized that in both language and scope" California's "liberty-of-speech-and-press clause" is "broader than the First Amendment."); *Wilson v. Superior Court*, 13 Cal. 3d at 658 (California free speech clause is more "definitive and inclusive" than first amendment).

Although the free speech clause of the California Constitution is similar to the first amendment, the two are not the same. *Gonzales v. Superior Court*, 180 Cal. App. 3d 1116, 1122, 226 Cal. Rptr. 164 (1986). A comparison of the two provisions shows that the California Constitution has supplemented the first amendment's proscription of laws abridging free speech with an affirmative right of "every person" to "freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." Cal. Const. art. I, § 2. This provision, and the correlative right to petition for redress of grievances and to assemble "are construed as more protective, definitive and inclusive of rights to expression of speech than their federal counterparts." *Gonzales*, 180 Cal. App. 3d at 1123.

This Court already has acknowledged the separateness, adequacy and independence of the California Constitution's free speech provision. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d at 908-10.

Robins required the courts to apply this Court's earlier decision in *Lloyd v. Tanner*, 407 U.S. 551 (1972), in which this Court held that the first amendment did not prevent a shopping center owner from prohibiting distribution of leaflets when they communicated no information relating to the center's business and when there was an adequate, alternate means of communication. The California Supreme Court in *Robins* concluded that *Lloyd* "does not prevent California's providing greater protection than the First Amendment now seems to provide" *Robins*, 23 Cal. 3d at 910, and that the California Constitution protects speech and petitioning, reasonably exercised, in privately owned shopping centers. *Id.*

In reaching that conclusion, the California Supreme Court noted:

> Though the framers [of the California constitution] could have adopted the words of the federal Bill of Rights they chose not to do so. (*See* Note, *Rediscovering the California Declaration of Rights* (1974) 26 Hastings L.J. 481.) Special protections thus accorded speech are marked in this court's opinions.

23 Cal. 3d at 908.

When the shopping center owner appealed from the California Supreme Court's decision, this Court held that its conclusion in *Lloyd* did not limit a state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Lloyd v. Tanner*, 447 U.S. at 81.

Against the backdrop of this Court's recognition of the California Constitution's greater solicitousness for the protection of free speech, the California Supreme Court in the decision below undertook its free speech analysis with frequent reference to "First Amendment" principles, as defined to include the broader California free speech clause.[8]

Mr. Blatty argues that this court may review the California Supreme Court's decision because its reference to

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[8] The California Supreme Court used a similar approach previously. In *People v. Glaze*, 27 Cal. 3d 841, 844 n.2, 614 P. 2d 291, 166 Cal. Rptr. 859 (1980), the court rested its entire decision on article I, section 2 of the California Constitution and noted:

> This section is more protective of speech than the First Amendment of the United States Constitution. [citation omitted.] This court therefore only addresses the question whether the challenged [municipal code section] is consistent with the California Constitution. Nevertheless, in keeping with convention, the free speech rights at stake will be referred to as First Amendment rights.

27 Cal. 3d at 844 n.2.

federal constitutional decisions shows a reliance on federal law. As the *Robins* cases before the California Supreme Court and this court illustrate, mere reference to federal constitutional decisions does not establish the federal constitution as the governing standard. "Federal law can provide guidance, even though it is not controlling in this area. California principles will prevail, though, as long as federal rights are protected." *Gonzales*, 180 Cal. App. 3d at 1123.[9]

The California Constitution's broader protection for free speech thus dictated the result below. That protection would continue regardless of this Court's decision on the first amendment issue that the petition presents. There is therefore no basis for a review by this Court.

CONCLUSION

Because the California Supreme Court, in both of its opinions unanimously affirming the dismissal of petitioner's claims, "clearly and expressly" stated that its decision was based on state law grounds adequate to sustain the decision and independent of the federal constitutional basis for the majority holding, this Court lacks jurisdiction to grant the petition. Both the California tort principles upon which the concurring justices relied and the California constitutional

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[9] *See Alim v. Superior Court*, 185 Cal. App. 3d 144, 229 Cal. Rptr. 599 (1986) ("[W]e do not use the federal precedents as federal law. Rather, we use them by analogy to inform us of the content of our own constitutional protections of a free press, . . . which are 'more definitive and inclusive than the First Amendment. . . .' [Citation omitted]. In this matter we found our decision wholly upon the California Constitution and resolve questions about the application of federal precedents as questions of state law"); *accord, U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory*, 154 Cal. App. 3d 1157, 1163, 201 Cal. Rptr. 837 (1984).

principles that underlay the majority's holding are independent of federal considerations.

The petition for a writ of certiorari should be denied.

DATED: June 3, 1987

Respectfully submitted,

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No. .....

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

WILLIAM PETER BLATTY,
Petitioner,

vs.

NEW YORK TIMES COMPANY,
and DOES 1 through 10, inclusive,
Respondents.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

INTRODUCTION.

The issue presented in this case involves the extent to which the First Amendment to the United States Constitution places limits upon non-defamation tort causes of action that are premised upon an injurious falsehood. Specifically, the question is whether, under the First Amendment, the "of and concerning" requirement that pertains to defamation causes of action must be satisfied in a cause of action for intentional interference with prospective economic advantage. The California Supreme Court held that it must.

This holding was not based upon any logical relationship between the "of and concerning" requirement and the intentional interference tort. Rather, as more fully explicated below and in the Petition for a Writ of Certiorari, that decision was based upon the California Supreme

Court's interpretation of two decisions by this Court, both of which arose in the specific context of the First Amendment as it relates to defamation. Petition at 14-28; Pet.App. at 80-91. *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

The state court construed *Sullivan* and *Baer* as requiring satisfaction of the First Amendment elements of a defamation cause of action whenever a plaintiff claims an injury based upon a false statement made by a media defendant. This construction of *Sullivan* and *Baer* involves a further intrusion of federal constitutional law into the realm of state tort law.

Moreover, the decision of the California Supreme Court is in conflict with a recent decision by the Fourth Circuit Court of Appeals over which this Court has granted review. *Falwell v. Flynt*, 797 F. 2d 1270 (4th Cir.), *reh. den.*, 805 F.2d 484, cert. granted, 107 S.Ct. 1601 (1987).[1] Petitioner contends that a combination of the importance of the issue presented and the conflict with *Falwell* make this case an appropriate candidate for this Court's review. Full briefing on this case and *Falwell* will provide the Court an important opportunity to thoroughly examine the extent to which the First Amendment applies to torts that allege a non-defamatory injurious falsehood.

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[1]Respondent states without elaboration that the conflict between this case and *Falwell* is dictum. Respondent's Brief at 8-9 n.5. In fact, the disagreement between the California Supreme Court and the *Falwell* Court is based upon a fundamental difference in each court's respective approach to the First Amendment as it applies to torts involving non-defamatory falsehoods. According to the California Supreme Court, the rules adopted in the context of defamation must be applied to all such torts; according to the *Falwell* Court, although the First Amendment fully applies to such torts, the specific rules developed in the context of defamation need only be applied to the extent those rules are relevant to the elements of the tort. *See Falwell, supra* at 1275. The California Supreme Court specifically rejected this reasoning. Pet.App. at 99-100.

In its opposition to the Petition, *respondent does not address the substantive issue presented.* Instead, respondent argues the decision of the California Supreme Court was based upon an independent and adequate state ground. In so arguing, respondent creatively rewrites the decision of the California Supreme Court and at the same time misinterprets this Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983). Indeed, the approach adopted by respondent confirms that the decision below was not based on an independent and adequate state ground, but was based squarely on federal precedent.[2]

II.

RESPONDENT'S DESCRIPTION OF THE CALIFORNIA SUPREME COURT DECISION.

A. Misleading Assertion.

Respondent's description of the decision below appears in an argumentative section of its brief entitled, "Statement of the Case". Respondent's Brief at 6-10.[3] The

---

[2]It would appear that respondent's reluctance to discuss the substantive issue is based upon a desire to avoid discussing the federal decisions upon which that issue rests.

[3]Oddly enough, respondent begins its description of the California Supreme Court decision with a quotation from the concurring and dissenting opinion. Respondent's Brief at 6. The point of this quotation is illusive since the issue now presented is whether the *majority* of the California Supreme Court decided this case based upon federal law. The views of the dissent are entirely irrelevant to this point. As previously noted (Pet. 8 fn.4), the dissent inexplicably overlooked specific intentional language of the complaint, *e.g.*, "At the time . . . such representations [about the List were made], defendants knew them to be untrue" (Pet.App. 6) and "Defendants acted maliciously and in conscious disregard of Blatty's rights and with the intent and purpose of depriving Blatty of his rights and properties in refusing to include *Legion* on the List for many weeks for which it qualified" (Pet.App. 13). This case was argued October 7, 1986 and, due to the

description does not include any discussion of how the California Supreme Court arrived at its holding. Nor does the description quote in full the language which, according to respondent, provides a clear and express statement of the state law grounds of decision. Instead, respondent provides a cleverly worded description of the California Supreme Court decision that is both inaccurate and misleading. It leaves one with a false impression of what the California Supreme Court actually said with respect to the basis for its holding. It also suggests, without any supporting explanation, that the state court discussed and applied several state authorities in assessing the constitutional question presented. Both contentions are fully refuted by any fair examination of the California Supreme Court's decision.

After describing the California Supreme Court's holding (and ignoring completely the federal cases discussed by the court in arriving at that holding), respondent makes the following assertion:

> The majority opinion rested both on federal first amendment and on state free speech grounds. The majority "clearly and expressly" stated a bona fide separate, adequate and independent" state constitutional ground, on which it "primarily rel[ied]" for its decision (App. 103 n.4), entirely apart from any first amendment considerations.

Respondent's Brief at 7. *This is not a description of what the California Supreme Court said or did; it is a description of what respondent wishes that Court had done.*

In any event, the opening sentence of the above quotation concedes federal law played a part in the decision.

November election result, was one of a large number of cases required to be decided before December 31, 1986. In any event, *the majority opinion* is based not upon pleading allegations but upon First Amendment grounds. (Pet. 6, 7 and citations therein)

That being the case, under *Michigan v. Long,* 463 U.S. 1032 (1983), the question is whether "the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached". 463 U.S. at 1041. The California Supreme Court never addressed itself to this point. Respondent, in an apparent recognition of this failing, however, has attempted to rewrite the California Supreme Court decision in order to make it appear otherwise.

To this end, the second sentence of the above quote is a curious admixture of unattributed language from *Michigan v. Long* (the first two quoted phrases), two words extracted from the California Supreme Court decision ("primarily relied") and *an additional, telling phrase supplied by respondent.* That additional phrase — "entirely apart from any first amendment considerations" — is the key to the description. It is designed to satisfy concerns expressed in *Michigan v. Long.* Indeed, had the California Supreme Court actually used such a phrase and such an approach, this case would be in a very different posture. But no such phrase or approach was used. The fact that respondent seems compelled to supply the needed language of compliance merely underscores the deficiency of the California Supreme Court opinion on this score.

The actual language used by the California Supreme Court appears in a footnote and reads as follows:

> Throughout this opinion we have used "First Amendment" to refer not only to that provision of the United States Constitution, but also to article I, section 2, of the California Constitution. It is the latter on which we primarily rely.

Pet.App. at 103 n.4. There is no suggestion, much less any specific language, indicating that the California Constitution was construed "entirely apart" from its federal

counterpart. Indeed, the footnote suggests to the contrary — the United States Constitution was relied upon. The ambiguity of the language adopted by the California Supreme Court leaves the extent and role of the United States Constitution unclear. Whether federal precedents were deemed controlling or merely advisory simply cannot be ascertained. The actual basis for the decision becomes even more ambiguous when one considers the text of the opinion in which primary reliance is placed on federal precedent. Pet.App. at 80-91.

B. Decision Below Based on Federal Precedent.

In seeming recognition of these flaws, respondent attempts to recharacterize the body of the opinion by asserting that "the majority opinion was *strewn* with references to decisions of the California Supreme Court. The Court quoted from or cited ten separate California decisions in its analysis of the constitutional free speech issue, alone". Respondent's Brief at 8 (emphasis added).

Respondent does not explain how any of these "separate California decisions" played a role in the formulation of the state court's holding. This is not surprising since the section of the California Supreme Court's opinion in which it discusses the precise issue now presented, namely, whether the First Amendment requires imposition of the "of and concerning" requirement to the intentional interference tort, is not "strewn" with references to state decisions. In fact, only five state authorities are cited in that section, four of which are cited solely for propositions collateral to the issue being decided.[4]

[4]Of these four cases, three were cited in introductory paragraphs in which the California Supreme Court described in very general terms the breadth of the protection afforded the press under the federal and state constitutions. The respondent devotes four pages (Brief 15-18) to a discussion of cases characterizing the California Constitution as establishing a zone of protection broader than the First Amendment.

Pet.App. 77-91. The one California case that is relied upon, and then only marginally, was itself a decision unequivocally based on the First Amendment to the United States Constitution. *Readers Digest Association v. Superior Court*, 37 Cal.3d 244, 208 Cal.Rptr. 137, 690 P. 610 (1984) (construing and applying *Gertz v. Welch*, 418 U.S. 323 (1974)).

Any fair reading of the text of the California Supreme Court's opinion confirms the decision was based almost exclusively upon an interpretation of two decisions by this Court: *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Rosenblatt v. Baer*, 383 U.S. 75 (1966).[5] To suggest otherwise can only be a product of the most wishful thinking.

In sum, respondent's descripton of the decision below is far from accurate. The description of the text of the opinion is both factually incorrect and incomplete. The enhanced description of footnote four is misleading and indicative of the lack of a sound basis for respondent's contention that the decision of the California Supreme

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However, not one of the cases discussed bears upon the instant issue. As to that issue, the California Supreme Court explicitly reasoned to the result from this Court's holdings. (Petition 43-46)

The fourth case was cited at the end of a string of citations for the collateral proposition that actual malice must be established in a case involving false light invasion of privacy. *Kapellas v. Kofman*, 1 Cal.3d 20, 459 P. 2d 912, 81 Cal.Rptr. 360 (1969). Other state law decisions are defamation cases cited in a subsequent section of the opinion relative to whether petitioner's pleadings satisfied the "of and concerning" requirement. Those decisions had no bearing on the requisites of constitutional law, state or federal. Specifically, not one of the California decisions led to the resolution of the instant issue, whether the "of and concerning" element is required by the First Amendment in non-defamation cases.

[5]Amazingly, Respondent's Brief does not even mention *Rosenblatt v. Baer, supra*, the linch pin in the California Supreme Court's reasoning. (Pet.App. 81, 82)

Court was based on an independent and adequate state ground.

III.

NO INDEPENDENT AND ADEQUATE STATE GROUND.

As previously indicated, in *Michigan v. Long*, 463 U.S. 1032 (1983), this Court expressed concerns regarding the difficulty of determining whether state court decisions rested on state or federal grounds when a state court decision has relied upon both state and federal precedent. (Petition 48, *et seq.*)

The opinion of the California Supreme Court, at least with respect to the substantive issue now presented, rests almost exclusively on federal grounds. Petition at 43-47. Indeed, there is very little intermixing of state and federal decisions. Consistent with *Michigan v. Long*, "the most reasonable explanation [is] that the state court decided the case the way it did because it believed that federal law required it to do so". 463 U.S. at 1041. The only legitimate question is whether footnote four to the California Supreme Court's meets the "plain statement" requirement of *Michigan v. Long*:

> If a state court chooses merely to rely on federal precedent as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. *Id.* at 1041.

Without any elucidation, respondent asserts footnote four satisfies these requirements:

> "A more 'plain statement' that a decision rests upon separate state grounds cannot be imagined. . . ." (Brief at 13)

Respondent's *ipse dixit* ignores precedent (*e.g. State v. Stroud*, 720 P. 2d 436, 439 (Sup.Ct. Wash. 1986)) and the facts. Nothing in footnote four indicates federal cases were "used only for the purpose of guidance". Rather, the language concedes an intermingling of federal and state constitutional law. Nor does the footnote in any manner undermine the fair inference drawn from the text of the opinion that federal authority compelled the result the court reached. Even if the state constitution were the primary source of authority for the decision, it is unclear the extent to which the interpretation of the state constitution was compelled by federal precedent. *Indeed, in the body of the opinion, the California Supreme Court indicates that its conclusion is mandated by the Supremacy Clause of the United States Constitution.*[6] Pet.App. at 99-100. In sum, there is no statement that "indicates clearly and expressly" the independence and adequacy of the state grounds of decision. *Id.* 1041. (Pet. 53-55)

In recent decisions, this Court has continued to insist when a state decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law", the independence and adequacy of any alleged state ground for decision must be "clear from the face of the opinion". *Montana v. Hall*, 107 S.Ct. 1825, 1827 n.3 (1987); see also

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[6]It is upon this basis, the Supremacy Clause, that the California Supreme Court, rejects the reasoning of the Fourth Circuit Court of Appeals in *Falwell v. Flynt, supra.* Pet.App. at 99-100. Had the basis for the California Supreme Court's decision been an independent and adequate state ground, this reference to and reliance upon the Supremacy Clause would have been superfluous.

Maryland v. Garrison, 107 S.Ct. 1013, 1017 (1987) (failure to include "plain statement" establishes federal jurisdiction).

IV.

CONCLUSION.

The California "of and concerning" cases referred to in respondent's Brief deal with that element as required *in defamation actions*. The point at issue here is whether the "of and concerning" element is required by the First Amendment in a non-defamation case. In concluding that such an element is required, the California Court relied on federal precedents. (Pet. 14-17, 43-47)

Aside from the certworthiness of the substantive issues presented in the Petition for a Writ of Certiorari, the California Supreme Court's treatment of the purported independent and adequate state ground issue merits this Court's immediate attention. Footnote four of the state court's opinion appears designed to insulate that decision from this Court's review while at the same time permitting the state decision to operate as a substantial federal precedent. (Pet. 47, fn. 12) This type of judicial gamesmanship should be addressed and rejected by this Court.

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I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On June 15, 1987, I served the within Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari in re: "William Peter Blatty vs. New York Times Company" in the United States Supreme Court, October Term 1986;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 15, 1987, at Los Angeles, California.

Ce Ce Medina

CE CE MEDINA